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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH A. MARESSA,,
Petitioner,
vs.

NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMAN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBER NARUS, jointly, severally and in the alternative,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. In a civil proceeding for libel, brought by a public official, a New Jersey State Senator, against a magazine, its owner, publisher, editor-in-chief, an editor and the three reporters who wrote the subject story, do the First Amendment to the United States Constitution, Article I, paragraph 6 of the New Jersey Constitution, and the New Jersey "Shield Law", N.J.S.A. 2A:84A-21 *et seq*, afford an absolute privilege against revelation of sources and defendants' editorial processes, in light of the United States Supreme Court decision in *Herbert v. Lando*, 441 U.S. 153, 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979), in which this Court held, inter alia, that an individual's interest in his reputation is as basic a concern as any other right, and that editorial processes are discoverable, and the heavy burden of proof placed upon defamation plaintiffs by Constitutional considerations in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), and its progeny?

2. Does the interpretation given the New Jersey "Shield Law", N.J.S.A. 2A:84A-21, *et seq*, by the Supreme Court of New Jersey in this case amount to a denial of equal protection and due process of law by, in effect, abolishing the right of public officials and public figures to bring a civil action for defamation since the requirement of *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), that these defamation plaintiffs prove subjective malice, as therein defined, will never be met under this interpretation?

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No.

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NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMAN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBER NARUS, jointly, severally and in the alternative,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

JOSEPH MARESSA, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-titled case on May 6, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 89 N.J. 176, 445 A.2d 276 (1982) and is printed in Appendix A hereto, *infra*, page 1a. The Order of the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-18536-79, dated October 15, 1980, is printed in Appendix C hereto, *infra*, page 33a.

JURISDICTION

The judgment of the Supreme Court of New Jersey (Appendix A, infra, page 1a) was entered on May 6, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY CONSTITUTION
Article I, Paragraph 6

6. Liberty of speech and of the press; libel; province of jury

6. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.J.S.A. 2A:84A-21

2A:84A-21. Newspaperman's privilege

Rule 27.

Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere,

a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.
Amended by L.1977, c. 253, §1, eff. Oct. 5, 1977.

2A:84A-21a. Definitions

Unless a different meaning clearly appears from the context of this act, as used in this act:

a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.

c. "Newspaper" means a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter.

d. "Magazine" means a publication containing news which is published and distributed periodically, has a paid circulation and has been entered at a United States post office as second class matter.

e. "News agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

f. "Press association" means an association of newspapers or magazines formed to gather and distribute news to its members.

g. "Wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

h. "In the course of pursuing his professional activities" means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eye-witness to, or participant in, any act involving physical violence or property damage.
Added by L.1977, c. 253, §2, eff. Oct. 5, 1977.

2A:84A-21.1 Subpena; disclosure of information; application of act

Where a newsperson is required to disclose information pursuant to a subpena issued by or on behalf of a defendant in a criminal proceeding, not including proceedings before administrative or investigative bodies, grand juries, or legislative committees or commissions, the provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege under Rule 27 (C.2A:84A-21).
L.1979, c. 479, §1, eff. Feb. 27, 1980.

2A:84A-21.2 Time of proceedings

Proceedings pursuant to this act shall take place before the trial, except that the court may allow a motion to institute proceedings pursuant to this act to be made during trial if the court determines that the evidence sought is newly discovered and could not have been discovered earlier through the exercise of due diligence. L.1979, c. 479, §2, eff. Feb. 27, 1980.

2A:84A-21.3 Prima facie showing subpenaed materials obtained during professional activities; waiver of privilege or other grounds for disclosure; hearing

a. To sustain a claim of the newsperson's privilege under Rule 27 the claimant shall make a prima facie showing that he is engaged in, connected with, or employed by a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated, and that the subpenaed materials were obtained in the course of pursuing his professional activities.

b. To overcome a finding by the court that the claimant has made a prima facie showing under a. above, the party seeking enforcement of the subpena shall show by clear and convincing evidence that the privilege has been waived under Rule 37 (C.2A:84A-29) or by a preponderance of the evidence that there is a reasonable probability that the subpenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issues of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. Publication shall constitute a waiver only as to the specific materials published.

c. The determinations to be made by the court pursuant to this section shall be made only after a hearing in which the party claiming the privilege and the party seeking enforcement of the subpena shall have a full opportunity to present evidence and argument with respect to each of the materials or items sought to be subpenaed.
L.1979, c. 479, §3, eff. Feb. 27, 1980.

2A:84A-21.4 In camera inspection; hearing; determination of admissibility; order for production

Upon a finding by the court that there has been a waiver as to any of the materials sought or that any of the materials sought meet the criteria set forth in subsection 3.b., the court shall order the production of such materials, and such materials only, for in camera inspection and determination as to its probable admissibility in the trial. The party claiming the privilege and the party seeking enforcement of the subpena shall be entitled to a hearing in connection with the in camera inspection of such materials by the court, during which hearing each party shall have a full opportunity to be heard. If the court, after its in camera review of the materials, determines that such materials are admissible according to the standards set forth in subsection 3.b., the court shall direct production of such materials, and such materials only.
L.1979, c. 479, §4, eff. Feb. 27, 1980.

2A:84A-21.5 Hearings; findings of fact and conslusions of law

After any hearing conducted by the court pursuant to sections 3 or 4 hereof, the court shall make specific findings of fact and conclusions of law with respect to its rulings, which findings shall be in writing or set forth on the record.
L.1979, c. 479, §5, eff. Feb 27, 1980.

2A:84A-21.6 Appeals; stay of penalty; sealing of record; return of privileged material

An interlocutory appeal taken from a decision to uphold or quash a subpena shall act as a stay of all penalties which may have been imposed for failure to comply with the court's order. The record on appeal shall be kept under seal until such time as appeals are exhausted. In the event that all material or any part thereof is found to be privileged, the record as to that privileged material shall remain permanently sealed. Any subpenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged, shall be returned to the party claiming the privilege.
L.1979, c. 479, §6, eff. Feb. 27, 1980.

2A:84A-21.7 Co-defendants; notice of proceedings, right to intervene

Where proceedings are instituted hereunder by one of several co-defendants in a criminal trial, notice shall be provided to all of the co-defendants. Any co-defendant shall have the right to intervene if the co-defendant can demonstrate, pursuant to section 3 [N.J.S.A. 2A:84A-21.3] that the materials sought by the issuance of the subpena bear upon his guilt or innocence. Where such intervention is sought by a co-defendant, that co-defendant shall be required, prior to being permitted to participate in any in camera proceeding, to make that showing required of a defendant in section 3.
L.1979, c. 479, §7, eff. Feb. 27, 1980.

2A:84A-21.8 Assessment of costs or counsel fee

If the court finds no reasonable basis for requesting the information has been shown, costs, including counsel fee, may be assessed against the party seeking enforcement of the subpena. Where an application for costs or counsel fee is made, the judge shall set forth his reasons for awarding or denying same.
L.1979, c. 479, §8, eff. Feb. 27, 1980.

2A:84A-21.9 News media person or entity; freedom from searches and seizures of documentary materials; exceptions

Any person, corporation, partnership, proprietorship or other entity engaged on, engaged in, connected with, or otherwise employed in gathering, procuring, transmitting, compiling, editing, publishing, or disseminating news for the public, or on whose behalf news is so gathered, procured, transmitted, compiled, edited, published or disseminated shall be free from searches and seizures, by State, county and local law enforcement officers with respect to any documentary materials obtained in the course of pursuing the aforesaid activities whether or not such material has been or will be disseminated or published.

This section shall not restrict or impair the ability of any law enforcement officer, pursuant to otherwise applicable law, to search for or seize such materials, if there is probable cause to believe that:

a. The person, corporation, partnership, proprietorship or other entity possessing the materials has committed or is committing the criminal offense for which the materials are sought; or

b. The immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

c. The giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration or deliberate concealment of the documentary materials other than work product; or

d. The documentary materials, other than work product, have not been produced in response to a court order directing compliance with a subpena duces tecum, and

(1) All appellate remedies have been exhausted by the party seeking to quash the subpena duces tecum; or

(2) There is a probability that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice. In the event a search warrant is sought pursuant to this subparagraph, the person, corporation, partnership, proprietorship or other entity possessing the materials shall be afforded adequate opportunity to submit an affidavit to the court setting forth the basis for any contention that the materials sought are not subject to seizure.
L.1979, c. 488, §1, eff. Feb. 28, 1980.

2A:84A-21.10 Applications for search warrant; approval

In the event a search warrant is sought pursuant to Section 1 of this act, all applications to the court for such warrants shall be approved in advance of their submission by the Attorney General or the prosecutor of the county in which execution of the warrant will take place.
L.1979, c. 488, §2, eff. Feb. 28, 1980.

2A:84A-21.11 Civil cause of action for damages due to violation

a. A person, corporation, partnership, proprietorship or other entity aggrieved by a search for or seizure of materials in violation of this act shall have a civil cause of action for damages for such search or seizure:

(1) Against the State of New Jersey, or against any other governmental unit, all of which shall be liable for violations of

this act by their officers, employees, or agents while acting within the scope or under color of their office, employment or agency.

(2) Against an officer, employee or agent of the State of New Jersey or any other governmental unit who has violated this act while acting other than within the scope or under color of his office, employment or agency. It shall be a complete defense to a civil action brought under this paragraph that the officer, employee or agent had a reasonable good faith belief in the lawfulness of his conduct unless his error is due to an ignorance of an official statement of the law.

b. The state of New Jersey or any other governmental unit, liable for violations of this act under paragraph 3(a)(1), may not assert as a defense to a claim arising under this act the immunity of the officer, employee or agent whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judge.

c. The remedy provided by paragraph 3 a.(1) against the State of New Jersey or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this act, against the officer, employee or agent whose violation gave rise to the claim, or against the estate of such officer, employee or agent.

d. A person, corporation, partnership, proprietorship or other entity having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000.00, such punitive damages as may be warranted, and such reasonable attorney's fee and other litigation costs reasonably incurred as the court, in its discretion, may award; provided, however, that the State of New Jersey or any other governmental unit shall not be liable for interest prior to judgment.

e. The Attorney General is authorized to settle a claim for damages brought against the State of New Jersey under this section and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this act by an officer, employee or agent of the State of New Jersey or any other governmental unit and for the imposition of administrative sanctions against such officer, employee or agent if warranted.

f. A county prosecutor may settle a claim for damages brought against the county of his jurisdiction or any other governmental unit under this section.
L.1979, c. 488, §3, eff. Feb. 28, 1980.

2A:84A-21.12 Definitions

As used in this act: a. "Documentary materials" means materials upon which information is recorded and includes, but is not limited to, written or printed materials, photographs, tapes, videotapes, negatives, films, outtakes and interview files.

b. "Work product" means any documentary materials created by or for a person in connection with his plans, or the plans of the person creating such materials, to gather, file, procure, transmit, compile, edit, publish or disseminate news for the public, except such work product as constitutes contraband, or the fruits, instrumentalities or evidence of a crime.

c. "Any other governmental unit" includes any branch, subdivision or agency of the government of the State or any locality within it.

d. "Attorney General" means the Attorney General of the State of New Jersey, or his designee.

e. "County prosecutor" means the duly appointed prosecutor of a county, or his designee.
L.1979, c. 488, §4, eff. Feb. 28, 1980.

2A:84A-21.13 Inapplicability of act to rights of department of corrections

Nothing contained in this act shall be construed to limit the right of the Department of Corrections to search the offices of inmate newspapers or the public information offices of any inmate organization located within a correctional facility.
L.1979, c. 488, §5, eff. Feb. 28, 1980.

NOTE: "Subpena" is reproduced as contained in the official report.

NEW JERSEY EVIDENCE RULE 37

RULE 37. Waiver of privilege by contract or previous disclosure; limitations

A person waives his right or privilege to refuse to disclose or prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question.

L.1960, c. 52, p. 459, §29. [N.J.S. 2A:84A-29].

STATEMENT

This civil action for libel arose from the publishing of an article entitled "Rating the Legislature" in the October, 1979, issue of New Jersey Monthly magazine. Plaintiff, then State Senator, JOSEPH A. MARESSA was included in "The Worst" category. Named as defendants were the magazine, the publisher and editors of the magazine, and the authors of the specific article.

Interrogatories were served upon defendants, and depositions of the three reporters were taken in the early months of 1980. By way of this discovery, plaintiff sought identification of the sources of the information contained in the article, as well as rough drafts of the article, notes, memos and other written documentation gathered in the course of compiling the article. The response of defendants to each of these inquiries was that the information was privileged. During the depositions, defendants' counsel raised the privileges contained in the First Amendment to the United States Constitution, the New Jersey Constitution, and the New Jersey Newspaperman's Statutory Privilege, N.J.S.A. 2A:84A-21, *et seq.*

Plaintiff filed a motion with the trial court seeking an order compelling disclosure of the information sought by way of discovery. The issues raised were briefed by all parties, and the trial court heard oral argument. That court's ruling is embodied in the Order dated October 13, 1980 (Appendix C, page 33a).

Thereafter, defendants sought leave of the Superior Court of New Jersey, Appellate Division, to file an interlocutory appeal from the trial court's Order. Leave to appeal was granted. While the matter was pending, unheard, in the Appellate Division, the case was certified to the New Jersey Supreme Court. That court's opinion was rendered on May 6, 1982 (Appendix A, page 1a).

Directly at issue are the rights and privileges of "the press" guaranteed by the First Amendment of the United States Constitution, Article I, paragraph 6 of the New Jersey Constitution, and the New Jersey "Shield Law", vis-a-vis the rights and privileges of persons in the field of defamation law, be they ordinary citizens or public officials or public figures, whose burden of proof in defamation actions is defined in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964).

The New Jersey Supreme Court decision (Appendix A, page 1a, "*Maressa* decision") recognized the interplay of the United States and New Jersey Constitutions upon the development of the New Jersey Shield Law. Prior to the *Maressa* decision, the recent New Jersey Supreme Court opinions relating to the Shield Law were in the realm of criminal proceedings, where the Sixth Amendment to the United States Constitution presented a countervailing right. See *State v. Boiardo*, 82 N.J. 446, 414 A.2d 14 (1980), after remand, 83 N.J. 350, 416 A.2d 793; *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), cert.den.sub.nom. *New York Times v. New Jersey*, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670.

The New Jersey Supreme Court disagreed with the dissenting Justice's (Appendix B, page 24a) finding that the New Jersey Constitution provided for a cause of action for libel in Article I, paragraph 6. The Court also rejected the argument that denial of the right to discover material potentially crucial to the cause of action was a violation of due process.

The ultimate holding of the Court was that the Shield Law's privilege against disclosure is absolute, there being no countervailing constitutional right compelling disclosure of sources and editorial processes in a libel case.

REASONS FOR GRANTING THIS WRIT

The effect of the New Jersey Supreme Court's decision in this case is to virtually foreclose any right of public officials or public figures to maintain a cause of action for libel. The practicalities of the Court's holding will be the elimination of discovery in libel suits and the consequent failure of public official and public figure plaintiffs to meet the requisite burden of proof.

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), established the standard of proof necessary for a public official in a libel action. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), extended those requirements to public figures. A public official or a public figure must prove that the defendant published a damaging falsehood "with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *New York Times, supra*, 376 U.S. at 280. In *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), recklessness was refined to the point that the plaintiff had to produce evidence "that the defendant in fact entertained serious doubts as to the truth of his publication". *St. Amant*, 390 U.S. at 731.

This trilogy of United States Supreme Court cases, all balancing the First Amendment right of a free press with an individual's interest in his reputation, imposed a heavy burden of proof on defamation plaintiffs. This burden made it essential that plaintiffs inquire into the conduct and state of mind of defendants.

Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), involved such inquiries. In that case this Court reiterated that "[s]preading false information in and of itself carries no First Amendment credentials. 'There is no constitutional value in false statements of fact.' *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340, 41 L.Ed.2d 789, 94 S.Ct. 2997 [1974]." *Herbert v. Lando, supra*, 60 L.Ed.2d at 131.

New Jersey has a "Shield Law", N.J.S.A. 2A:84A-21, *et seq*. The recently added sections of this law were in reaction to the New Jersey Supreme Court decision *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), cert.den.sub.nom. *New York Times v.*

New Jersey, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670, which arose from a criminal trial. See N.J.S.A. 2A:84A-21.1 through N.J.S.A. 2A:84A-21.13.

The basic section of the Shield Law, N.J.S.A. 2A:84A-21, is entitled "Newspaperman's privilege" and affords a privilege "to refuse to disclose . . . in any legal . . . proceeding . . ." sources through whom any information was "procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated or delivered; . . ." The latest amendment to this particular section was in 1977. It was not amended in 1980 when the later sections were added in response to *In Re Farber, supra.*

By interpreting the Shield Law as affording an *absolute* privilege against revelation of any information with regard to the writing of a defamatory article, the New Jersey Supreme Court has effectively foreclosed all public figures and public officials from attaining that evidence made necessary by *New York Times v. Sullivan, supra*, to carry the burden of proof. Thus, those persons are denied a right found to be constitutionally afforded them by the dissenting Justice in Article I, paragraph 6 of the New Jersey Constitution and a right afforded "ordinary citizens" in the normal course.

It is one thing to limit the exercise of a right; it is another to completely foreclose one class of citizens from exercising that right altogether. This amounts to a denial of equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution for that class of citizens, recently expanded in New Jersey to include those ordinary citizens who speak up at a public meeting. These citizens are now "public figures" in New Jersey, as well as those more easily categorized as such. See *Lawrence v. Bauer Publishing & Printing, Ltd.*, N.J. , A.2d (1982).

The Supreme Court of New Hampshire, in *Downing v. Monitor Publishing Co., Inc.*, 120 N.H. 383, 415 A.2d 683 (N.H. 1980), recognized the untenable position of defamation plaintiffs faced with both the *New York Times* burden of proof and an assertion of press privilege. Although there is no Shield Law in New Hampshire, that Court understood the consequences of affording an absolute privilege to the press.

> We hold that there is no absolute privilege allowing the press to decline to reveal sources of information when those sources are essential to a libel plaintiff's case. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), cert.den.sub.nom. *New York Times v. New Jersey*, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670. Even the President does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). *Downing*, 415 A.2d at 686.

As this Court noted in *Herbert v. Lando, supra,*

> In sum, contrary to the views of the Court of Appeals, according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times, Butts*, and similar cases.
> 60 L.Ed.2d at 129.

It is respectfully suggested that the New Jersey Supreme Court's decision in this matter places an intolerable burden upon a certain class of libel plaintiffs, which class was itself established by this Court's decisions, and which class has now effectively been denied a right afforded other citizens of the State of New Jersey.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 28, 1982

APPENDIX A

No. A-74

IN THE

Supreme Court of New Jersey

SEPTEMBER TERM, 1981

JOSEPH A. MARESSA,

Plaintiff-Respondent,

v.

NEW JERSEY MONTHLY and HENDRIX F.C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,

Defendants-Appellants.

Argued January 11, 1982 — Decided May 6, 1982

On certification to the Superior Court, Law Division.

Alan M. Wallack argued the cause for appellants (*Brener, Wallack & Hill,* attorneys; *Mr. Wallack* and *Joseph C. Mahon,* on the brief).

Arthur B. Hanson, a member of the District of Columbia Bar, argued the cause for *amicus curiae* American Newspaper Publishers Association (*Jamieson, McCardell, Moore, Peskin & Spicer,* attorneys; *Mr. Hanson, Frank M. Northam, Mitchell W. Dale* and *Arthur D. McKey,* members of the District of Columbia Bar, of counsel; *Thomas C. Jamieson, Jr.* and *Frances Goldmark,* on the brief).

Benjamin Goldstein argued the cause for respondent (*Maressa, Goldstein, Birsner & Patterson,* attorneys; *Mr. Goldstein* and *Nancy D. Gold,* on the brief).

Thomas J. Cafferty and *Frances Goldmark* submitted a brief on behalf of *amici curiae* New Jersey Press Association and the Trenton Times Corporation (*Seiffert, Frisch, McGimpsey & Cafferty* and *Jamieson, McCardell, Moore, Peskin & Spicer,* attorneys).

Peter G. Banta submitted a brief on behalf of *amicus curiae* The Bergen Evening Record Corporation (*Winne, Banta & Rizzi,* attorneys; *Mr. Banta* and *Donald A. Klein,* of counsel).

The opinion of the Court was delivered by PASHMAN, J.

Twice in recent years, this Court has mediated between a newsperson's right not to disclose confidential information and a criminal defendant's right to compel the production of witnesses in his or her favor. *State v. Boiardo*, 82 *N.J.* 446 (1980); *In re Farber*, 78 *N.J.* 259 (1978). We have held that the New Jersey Shield Law, *N.J.S.A.* 2A:84A-21, protects confidential information gathered by news media "to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey." *Farber, supra*, 78 *N.J.* at 270. Because criminal defendants have a constitutional right to obtain evidence necessary to their defense, *U.S. Const.*, Amend. 6; *N.J. Const.* (1947), Art. I, par. 10, including confidential information, we held in those criminal cases that the newsperson's privilege is not absolute.

Today, for the first time since the landmark libel case of *New York Times v. Sullivan*, 376 *U.S.* 254, 11 *L.Ed.* 2d 686 (1964), this Court must decide whether the Shield Law allows newspersons who are sued for libel to refuse to disclose their sources and editorial processes leading to publication of the alleged libel. As in the earlier criminal cases, we must decide here whether a countervailing constitutional right limits the Shield Law. In the present suit, which seeks monetary damages for alleged injury to reputation, we find no such right. We therefore hold that the newsperson's privilege in a civil action for libel is absolute. Since defendants have not waived their privilege, the trial court's order compelling answers to plaintiff's discovery requests must be reversed.

I

The October 1979 issue of *New Jersey Monthly* magazine contains an article entitled "Rating the Legislature" that evaluates the performance of New Jersey legislators. The article discusses several categories of representatives — including "The Best," The Worst" and "The Drones." Plaintiffs, Senator Joseph Maressa, appeared under "The Worst" category. He was described as a "floundering and ineffectual" man whose shortcomings went unnoticed by scores of extremists who, "appealing to Maressa's considerable ego, managed to enlist him as their advocate this term." Describing Maressa as "callous, stupid, and just plain devious," the article's authors listed several incidents upon which they based the senator's low rating. The article claimed that during a Senate debate of the death penalty, Maressa whined and attempted to cut off debate; that he smuggled an anti-gay lobbyist onto the Senate floor and then lied to the sergeant-at-arms that the lobbyist was his aide; that he was called before the Legislative Ethics Committee; and that he was "shot down" by the Supreme Court Advisory Committee. The article concluded, "Maressa's problem is not so much that he is evil as that he is sneaky, self-interested, and basically unprincipled."

Maressa filed a libel action in the Superior Court, Law Division, on December 12, 1979 against the magazine's owner, publisher, editor-in-chief, an editor and the three reporters who wrote the article. He alleged that the article falsely conveyed to the public that he was unfit to serve the people of New Jersey, and that he had participated in dishonest, illegal and unethical practices. Maressa further alleged that defendants had published the defamatory falsehoods without making reasonable inquiries as to their accuracy, thereby defaming him in reckless disregard of the truth.[1]

This interlocutory appeal arose during pretrial discovery proceedings. On February 11, 1980 plaintiff served interrogatories upon defendants, and on April 8, 1980 plaintiff took the depositions of the three reporter defendants. Maressa sought a broad range of information including names and addresses of all sources interviewed, copies of all rough drafts, notes, questions

[1] Maressa concedes that he is a public figure who must prove defendants' reckless or willful disregard of the truth in order to recover damages for libel. *New York Times v. Sullivan*, 376 *U.S.* 254, 11 *L.Ed.*2d 686 (1964).

and memos pertaining to the article, and a summary of what each source told the reporters. Defendants refused to provide any information about their sources or editorial processes. They answered each interrogatory with the word "privileged."

Plaintiff sought an order from the Law Division compelling more specific answers to the interrogatories and deposition questions. On June 27, 1980 the trial court ruled that the responses sought by plaintiff were not privileged; alternatively, the court found that any newsperson's privilege had been waived. Maressa then served upon defendants a supplemental set of interrogatories containing the unanswered questions. After defendants again claimed the newsperson's privilege, the trial court on October 15, 1980 directed them to provide more specific answers within 20 days or face judicial sanctions.

The Appellate Division granted defendants leave to appeal the order compelling disclosure. Before that court heard the appeal, we directly certified the matter on our own motion. *R.* 2:12-1. We now reserve.

II

The newsperson's privilege in New Jersey dates from a 1933 statute,[1] *L.* 1933, *c.* 167; *N.J.S.A.* 2:97-11. Like other evidentiary privileges, it limits the common law right to compel testimony in judicial proceedings. The Legislature enacts such privileges "because in the particular area concerned, they are regarded as serving a more important public interest than the need for full disclosure." *State v. Briley*, 53 *N.J.* 498, 506 (1969).

Unlike most other privileges, however, a newsperson's privilege has a constitutional foundation. While narrowly upholding a grand jury's right to subpoena reporters, the United States Supreme Court has unanimously recognized that a reporter's gathering of information receives some First Amendment protection. *See Branzburg v. Hayes*, 408 *U.S.* 665, 691 (1972) (opinion of White, J., joined by Burger, C.J., and Blackmun, Rehnquist, JJ.); *id.* at 709 (Powell, J., concurring); *id.* at 712 (Douglas, J., dissenting); *id.* at 725 (Stewart, J., dissenting, joined by Brennan and Marshall, J.J.).

Richmond Newspapers, Inc. v. Virginia, 448 *U.S.* 555, 65 *L.Ed.*2d 973 (1980), which recognized a First Amendment right to attend criminal trials, reinforced the newsperson's right to gather information:

> whether we describe this right . . . as a 'right of access' . . . or a 'right to gather information,' . . . we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'
>
> [448 *U.S.* at 576 (quoting *Branzburg v. Hayes, supra*, 408 *U.S.* at 681; additional citations and footnote omitted.).]

Lower federal courts have read *Branzburg* as supporting some First Amendment protection for reporters' use of confidential sources. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 *F.*2d 583, 594-95 (1st Cir. 1980); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 *F.Supp.* 1197, 1202

[1] New Jersey courts had not recognized a privilege under common law. In *In re Julius Grunow*, 84 *N.J.L.* 235 (Sup. Ct. 1913), the court affirmed a $25 contempt fine against a reporter who had refused to divulge his sources, holding that the asserted privilege "finds no countenance in the law."

(N.D. Ill. 1978); *see also* Lindberg, *Source Protection in Libel Suits*, 81 *Colum.L.Rev.* 338 (1981).

Federal constitutional protection of news gathering, however, gives newspersons only a qualified privilege not to reveal sources and other confidential information. In *Branzburg v. Hayes, supra*, the Court upheld grand jury subpoenas of newspaper reporters in three state courts. And in *Herbert v. Lando*, 441 *U.S.* 153, 60 *L.Ed.*2d 115 (1979), the Court held that the First Amendment does not preclude a plaintiff's inquiries into the editorial processes leading to publication of an allegedly defamatory television program.

To buttress the constitutional protection for news gathering, the Legislature has amended the Shield Law, *N.J.S.A.* 2A:84A-21, twice in recent years. Both enactments were in large part responses to judicial construction limiting the effect of the statute.

The bill that ultimately led to the 1977 Shield Law amendments, *L.*1977,*c.*253, was introduced shortly after the Appellate Division upheld incarceration of a newspaper reporter for his refusal to testify in *In re Bridge*, 120 *N.J. Super.* 460 (1972),[3] *cert. den.* 410 *U.S.* 991 (1973). There the court found that by disclosing the name of his source and some information received from the source, the reporter had waived his statutory privilege under the waiver provisions of *Evid. R.* 37, *N.J.S.A.* 2A:84A-29.[4]

[3]The legislative history of *L.* 1977, *c.* 253 is discussed in *In re Vrazo Subpoena*, [illegible] *N.J. Super.* 455, 461-52 (Law Div. 1980).

[4]Evidence Rule 37 states:

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question.

L. 1960, *c.* 52, p. 459, §29, eff. July 1, 1960.

At the time *Bridge* was decided, the statute granting the newsperson's privilege provided as follows:

> Subject to Rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished or delivered.
>
> *L.* 1960, *c.* 52. p. 458, §21, eff. July 1, 1960.

[footnote omitted.]

The Legislature responded to the finding of waiver in *In re Bridge* by creating separate privileges such that disclosure of information provided by a confidential source did not require the newsperson to identify the source. Beyond addressing the waiver issue, however, the Legislature thoroughly revamped the newsperson's privilege to make it more comprehensive. The Legislature revised the privilege to read:

> Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.
>
> a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
>
> b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated . . . .
>
> *L.* 1977, *c.* 253, §1, eff. Oct. 5, 1977; *N.J.S.A.* 2A:84A-21.

These amendments left no doubt that the Legislature intended to provide comprehensive protection for all aspects of news gathering and dissemination. The Court recognized this intent in *In re Farber*, holding:

> We read the legislative intent in adopting this statute in its present form as seeking to protect the confidential sources of the press as well as information so obtained by reporters and other news media representatives *to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey.*
>
> *[78 N.J.* at 270 (emphasis added).]

Disclosure of confidential information was ordered in *Farber* only because the newsperson's privilege conflicted with a criminal defendant's constitutional right to compel the attendance of witnesses and production of evidence in his favor.[3]

Following our decision in *Farber*, the Legislature again amended the Shield Law to grant newspersons increased protection in accord with constitutional limits. The new amendments established stringent prerequisites for judicial enforcement of a subpoena issued on behalf of a criminal defendant.[4] Applying the newly amended Shield Law in *State v. Boiardo, supra*, the Court vacated an order in a murder trial compelling a reporter to produce for *in camera* inspection a letter written by a prospective government witness. We found that the defendant had not met the statutory requirement of demonstrating the lack of less intrusive sources of the information contained in the letter. Moreover, we reaffirmed our holding in *Farber* "that the privilege created by *N.J.S.A.* 2A:84A-21, was intended by the Legislature to be *as broad as possible.*" 82 *N.J.* at 457 (emphasis added).

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[3] *U.S. Const.*, Amend. 6; *N.J. Const.* (1947), Art. I, par. 10.

[4] These amendments require the party seeking enforcement of the subpoena to prove either that the materials sought are necessary to the defense and not obtainable from any less intrusive source, or by clear and convincing evidence that the privilege has been waived. *N.J.S.A.* 2A:84A-21.3. The determination must be made before the trial judge orders *in camera* inspection. *Id.*

Twice in recent sessions, the Legislature has made evident its intent to preserve a far-reaching newsperson's privilege in this State. And twice in recent terms, this Court has construed the Shield Law to protect confidential information to the extent allowed by the United States and New Jersey Constitutions. Absent any countervailing constitutional right, the newsperson's statutory privilege not to disclose confidential information is absolute.

Plaintiff contends that this absolute privilege does not apply to certain news gathering activities that may be characterized as "editorial processes." These would include communications between newspersons, decisions about which leads to pursue and what information to publish, and the development of a newsperson's belief in the veracity of what he or she pursues and publishes. A reporter's basis for believing in the veracity of what is published has particular importance in an action for defamation by a public figure because, under *New York Times Co. v. Sullivan, supra,* a public figure must prove "actual malice" — willful or reckless disregard of the truth — to recover damages. According to plaintiff, because the Shield Law's enumeration of protected activities does not precisely specify "editorial processes," they are beyond the protection of the statute.

Plaintiff's argument is simplistic. It would deny comprehensive effect to the Shield Law merely because the Legislature did not include those specific words in its exhaustive list of news-gathering activities. It is clear that the Legislature did not intend such a narrow interpretation. The Legislature plainly expressed its intent that all significant news-gathering activities be protected. The Shield Law protects against disclosure of the *"source, author, means, agency or person* from or through whom any information was *procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered." N.J.S.A.* 2A:84A-21(a) (emphasis added). It also separately protects "any news or information obtained in the course of pursuing . . . professional activities whether or not it is disseminated." *N.J.S.A.* 2A:84A-21(b). This litany of protected activities was clearly intended to afford complete and pervasive security against disclosure.

Discovery of editorial processes is especially threatening to newspersons because it inhibits the exchange of ideas that is crucial to the functioning of a free and vigorous press. In his dissent in *Herbert v. Lando, supra,* Justice Brennan noted the concerns that had impelled the Court of Appeals, 568 *F.*2d 974, to find an absolute privilege not to disclose editorial processes as a matter of First Amendment right:

> "[i]deas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future 'likely' lead to a more muted, less vigorous and creative give-and-take in the editorial room." Chief Judge Kaufman stated that "[a] reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the sine qua non of responsible journalism."
>
> [441 *U.S.* at 193, 60 *L.Ed.*2d at 144, quoting *Herbert v. Lando,* 568 *F.*2d at 993-94 (Oakes, J., concurring); *id.* at 980 (Kaufman, C.J.)]

Although the United States Supreme Court reversed the Court of Appeal's decision, nothing in *Herbert v. Lando* militates against our interpreting the Shield Law to include the editorial process. The Court there simply held that the First Amendment does not grant a privilege to withhold editorial processes. There was no Shield Law at issue in the case. Moreover, the Court in *Branzburg v. Hayes,* 408 *U.S.* at 706, recognized that its holding does not "bar state courts from responding in their own way and construing their own Constitutions so as to recognize a newsman's privilege, *either qualified or absolute.*" (Emphasis added).

We need not determine whether the state constitution grants an absolute evidentiary privilege to newspersons not to disclose editorial processes, for it is clear that the state courts are equally free to enforce a privilege enacted by statute. As we stated in *Boiardo, supra,* "Absent . . . any clear impingement

on Sixth Amendment [or other constitutional] rights, the Court's task is simply to determine the legislative intent and to construe the statute accordingly." 82 *N.J.* at 457. We therefore construe the Shield Law's comprehensive language as applying to the decision-making processes of newspersons.

To summarize, we hold that the New Jersey Shield Law affords newspersons an absolute privilege not to disclose confidential sources and editorial processes, absent any conflicting constitutional right. We must now consider whether assertion of the newsperson's privilege impinges upon any constitutional rights of a plaintiff seeking money damages in a civil suit for defamation.

III

The law of defamation imposes liability for the publication of false matters injuring the reputation of others. W. Prosser, *Law of Torts* §111 at 739 (4th ed. 1971). Originally ignored by the common law courts and enforced instead by ecclesiastical tribunals, which regarded the publication as sin, *id.* at 737, defamation has become firmly embedded in all common law jurisdictions. Defamation "embodies the important public policy that individuals and business entities should generally be free to enjoy their reputations unimpaired by false and defamatory attacks." *Rainer's Dairies v. Raritan Valley Farms, Inc.*, 19 *N.J.* 552, 557 (1955). Decisions of this Court, *see, e.g., Rainer's Dairies, supra; Brogan v. The Passaic Daily News*, 22 *N.J.* 139 (1956), and the United States Supreme Court, *see, e.g., New York Times, supra; Herbert v. Lando, supra*, recognize the important societal interest in the protection of individual reputations.

However, the existence of a judicial remedy for injury to reputations is entirely a matter of state law. A plaintiff's "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a

forum for vindication of those interests by means of damages actions." *Paul v. Davis*, 424 *U.S.* 693, 712, 47 *L.Ed.*2d 405, 420 (1976).'

Following *Paul v. Davis*, federal courts have noted that "the State has created the [defamation] cause of action and hence . . . it can limit, modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation." *Mazella v. Philadelphia Newspapers*, 479 *F.Supp.* 523, 528 (E.D.N.Y. 1979). In *Steaks Unlimited, Inc. v. Deaner*, 623 *F.*2d 264 (1980), the Third Circuit interpreted the Pennsylvania Shield Law, 42 *Pa.Const.Stat.Ann.* §5942(a) (Supp. 1979), which is similar to the New Jersey Shield Law, as granting defendants the right not to disclose the unused portions of film taken for an allegedly defamatory television report. The court found that the privilege did not deny due process because there was no constitutional interest in defamation:

> The Constitution has never been construed as requiring the states to provide persons or organizations who have been defamed with a remedy for their injuries. It follows that, to the extent a state chooses to authorize a cause of action for defamation, it may also limit the plaintiff's ability to prove his claim in order to promote other social purposes.
>
> [*Id.* at 279 n. 74]

Likewise, this Court has held that although defamation actions serve an important public policy, "in certain situations there is a paramount public interest that persons be permitted to speak or write freely without being restrained by the possibility of an ensuing defamation action." *Rainer's Dairies*, 19 *N.J.* at 557-58. In many contexts our courts have refused to recognize a cause of action for defamatory statements, including statements made during judicial proceedings, *see Rogers v. Thompson*, 89 *N.J.L.* 639 (E. & A. 1916), before administrative agencies, *see Rainer's Dairies, supra*, and in complaints filed with this

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'The holding in *Paul v. Davis* was that an allegation of injury to reputation by a public official acting in the course of his duty, without official approval, failed to state a claim under 42 *U.S.C.* 1983 or the Fourteenth Amendment. *Paul v. Davis* did not affect a prospective plaintiff's right to sue for defamation under state law. It merely held that the right is not constitutionally based.

Court's Committee on Professional Ethics, *see Friedland v. Podhoretz*, 174 *N.J.Super.* 73 (Law Div. 1980). These limitations on the tort of defamation raise no constitutional issue because

> the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.
>
> [*Martinez v. California*, 444 *U.S.* 277, 282, 62 *L.Ed.* 2d 481, 487 (1980)]

The Shield Law protection of confidential news sources clearly does not constitute arbitrary or irrational state action.

We respectfully reject Justice Schreiber's argument that the New Jersey Constitution creates a constitutional right to maintain a libel action. Our dissenting colleague relies on Article 1, ¶6 of the Constitution:

> 6. *Liberty of speech and of the press; libel; province of jury.*
>
> Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.
>
> [Emphasis added]

Justice Schreiber would find a constitutional right to sue for libel in the underscored subordinate clause.

We disagree that the framers intended that clause to have such wide-ranging effect. The entire thrust of Art. 1, ¶6 is

protection of speech. The framers, however, did not want that protection to be absolute. Specifically, they did not view the existence of a libel action as inimical to free speech. They therefore inserted a clause to insure that the broad speech protection they were providing would not be construed to preclude libel suits.

This is all that the clause means. We do not believe it was intended to create a right to sue for damages in libel. Had the framers intended such a right, they surely would have expressed that intent more directly. In form and in context, this clause is no more than a caveat to the New Jersey equivalent to the First Amendment.

It would not be wise to construe our Constitution in a way that etches in stone any particular resolution of the difficult conflict between the right of the media to criticize public figures and the right of public figures to have redress for libel. Our holding, premised on our perception of legislative intent, balances those interests differently than the dissent would balance them. But the balance we adopt can always be changed by the Legislature. If we were to adopt the dissent's view, full protection for sources or editorial processes could only be provided by constitutional amendment.

We also reject plaintiff's argument that denying him discovery of material potentially crucial to his claim is a violation of due process. He cites *dictum* in *Brogan v. The Passaic Daily News, supra,* that "construction of the [Shield Law] permitting the deprivation of a party's right of cross-examination on vital issues of his cause of action could create constitutional difficulty of infirmity." 22 *N.J.* at 154. We agree that any plaintiff whose constitutionally protected interest has been damaged cannot be barred from proving that his rights have been violated. *See Bolardo, supra; Farber, supra.*

Applied to non-constitutional interests, however, plaintiff's argument would work to eliminate all statutory testimonial privileges. We have sustained testimonial privileges, even at the cost of denying a party information possibly vital to his action, "because in the particular area concerned, they are regarded as serving a more important public interest than the

need for full disclosure." *State v. Briley, supra,* 53 *N.J.* at 506. In *Cashen v. Spann,* 66 *N.J.* 541, 556 (1975). *cert. den.* 423 *U.S.* 829 (1975), the Court "emphasize[d] that in civil cases in which disclosure is sought . . . for the purpose of asserting claims for money damages, the interests of the State in maintaining . . . confidentiality . . . are entitled to a greater degree of respect." Federal courts have also noted that plaintiffs in civil actions do not have a compelling interest in obtaining confidential information. *See, e.g., Baker v. F. & F. Investment,* 470 *F.*2d 778, 785 (2d Cir. 1972), *cert.* den., 411 *U.S.* 966, 36 *L.Ed.*2d 686 (1973); *Democratic National Committee v. McCord,* 356 *F.Supp.* 1394 (D.D.C. 1973).

In this case, however, we need not evaluate plaintiff's interest in compelling disclosure, other than to affirm that it does not reach constitutional dimensions. The newsperson's privilege contains no limiting language. *Compare N.J.S.A.* 2A:84A-21 *with N.J.S.A.* 2A:84A-28(b) (limiting language found in informer's privilege). The Legislature has already balanced the interests and concluded that the newsperson's privilege shall prevail. Since a plaintiff in a defamation action has no overriding constitutional interest at stake, the newsperson's privilege is absolute in libel cases.[6]

IV

Because the newsperson's privilege asserted by defendants is absolute, plaintiff's motion to compel discovery of sources and editorial processes must fail unless defendants have waived the privilege. Relying on *Brogan v. The Passaic Daily News, supra,* plaintiff argues that the defendants have waived their Shield Law protection by partial disclosure and by the assertion of affirmative defenses, including truth, fair comment, good faith, honest belief and lack of malice. We hold that because of changes in the Shield Law and in the constitutional protection of libel defendants since *Brogan,* partial disclosure or the assertion of affirmative defenses no longer constitutes a waiver of the

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[6]To the extent that *Brogan v. The Passaic Daily News, supra,* differs from this conclusion, it is overruled.

Shield Law privilege. Waiver under the Shield Law operates only as to those specific materials that are knowingly and voluntarily disclosed.

In arguing that defendants have waived their privilege, plaintiff points to the fact that defendant authors revealed that they based their article upon interviews with some 50 lobbyists, administrative officials, legislative liasons, committee aides and Trenton journalists. This disclosure conceivably would have constituted a waiver before the 1977 Shield Law amendments, *see In re Bridge, supra.* The 1977 amendments, however, largely in response to the Bridge decision, tightened the requirements for waiver. The Legislature created separate privileges for sources and for information obtained in the course of pursuing professional activities. *N.J.S.A.* 2A:84A-21(a), (b). The privileges were intended to apply to every aspect of the news process. *Id.*

While the 1979 Shield Law amendments apply only to discovery requests by criminal defendants, the amendments give a clear indication of the Legislature's intent to narrow the scope of waiver in all proceedings. The 1979 amendments provide that "[p]ublication shall constitute a waiver only as to the specific materials published." *N.J.S.A.* 2A:84A-21.3(c), *L.* 1979, *c.* 479. In criminal proceedings, each piece of confidential information from a source, or about the source, must be separately considered for purposes of finding a waiver of the newsperson's privilege. It is inconceivable that the Legislature intended a broader view of waiver in civil matters, where the public interest in disclosure is less compelling. *See Cashen, supra,* 66 *N.J.* at 556. We therefore hold that publication[9] of privileged information constitutes a waiver only as to that specific information. The waiver does not operate as to any non-disclosed information.

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[9]We are giving "publication" its common usage in the law of libel, meaning communication to someone other than the plaintiff. Prosser, *Law of Torts, supra,* §113 at 766. *Black's Law Dictionary* (4th ed. 1968). Communication to another newsperson entitled to invoke the privilege, however, would not constitute waiver.

We recognize that the general provision on waiver, *Evid.R.* 37, still provides that "disclosure of any part of the privileged matter" constitutes a waiver. *L.* 1960, *c.* 52, *N.J.S.A.* 2A:84A-29. However, the specific waiver provisions in the Shield Law must prevail over the general waiver provision, particularly since the Shield Law provisions result from a more recent act of the Legislature. *See Brewer v. Porch*, 53 *N.J.* 167, 173 (1969); 2A Sands, Sutherland, *Statutory Construction* (4th ed. 1973). *See also In re Vrazo Subpoena*, 176 *N.J.Super.* 455 (Law Div. 1980) (disclosure of information does not waive privilege as to identity of source).

The Shield Law would have little force if its thorough protection of confidential information could be so easily waived. Where, as here, defendants have steadfastly refused to divulge their sources and the editorial processes leading to publication of the allegedly libelous article, a finding of waiver must be rejected.

We therefore hold that defendants have not waived their Shield Law privilege. Since that privilege is absolute in the context of a libel action, plaintiff's motion to compel discovery must be denied.

V

We pause here to add a note about the appropriate role of summary judgment in libel cases. Aside from the danger of a libel judgment and the intrusiveness of discovery of sources and editorial process, the cost of defending a libel action can itself deter free press.

The desultory pace of this three-year-old litigation gives little comfort to those who would assert their constitutional right to free speech about public affairs. This is especially true of the many smaller journals and local newspapers which have played an important role in the affairs of New Jersey but which cannot withstand high litigation costs. Our courts should resolve free speech litigation more expeditiously whenever possible. The

perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom. To avoid this, trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to a speedy end. *See Kotlikoff v. The Community News,* N.J. (1982); *Anderson v. Stanco Sports Library, Inc.*, 542 *F.*2d 638, 641 (4 Cir. 1976); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 *F.*2d 858, 864-65 (5 Cir. 1970); *Washington Post Co. v. Keogh*, 365 *F.*2d 965, 968 (D.C. Cir. 1966), *cert.* denied, 385 *U.S.* 1011 (1967); *Schuster v. U.S. News & World Report, Inc.*, 459 *F.Supp.* 973, 975 (D.Minn. 1978), *aff'd*, 602 *F.*2d 850 (8 Cir. 1979); *Cardillo v. Doubleday & Co.*, 366 *F.Supp.* 92, 94-95 (S.D.N.Y. 1973), *aff'd*, 518 *F.*2d 638 (2 Cir. 1975).[10]

Much of this case could have been disposed of by summary judgment. Most of the statements complained of by plaintiff here are obviously opinions, which under *New York Times v. Sullivan, supra,* and *Gertz v. Robert Welch, Inc.*, 418 *U.S.* 323 (1974), are absolutely privileged.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.
>
> [*Gertz v. Welch*, 418 *U.S.* at 339-40]

See Kotlikoff v. Community News, (slip op. at), *N.J.* at .

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[10] In libel actions, summary judgment may be more appropriate on some issues than on others. We have said that trial courts should not hesitate to grant summary judgment for defendant in cases of privileged expressions of opinion. However, summary judgment poses a more difficult problem where the issue is whether a defendant has published a defamatory falsehood with actual malice. As the United States Supreme Court has cautioned, the issue of a defendant's state of mind, "does not readily lend itself to summary disposition," *Hutchinson v. Proxmire*, 443 *U.S.* 111, 120 n.9 (1979). As noted, a public figure must prove that the libel was published with actual malice. *New York Times Co. v. Sullivan, supra*, 376 *U.S.* at 279-80. Furthermore, that proof must be "clear and convincing". *Gertz v. Robert Welch, Inc.*, 418 *U.S.* 323, 342 (1974). Courts should carefully examine the circumstances surrounding publication of defamatory allegations of fact to determine whether the issue of actual malice should go to the jury. *See infra,* slip op. at 31-33.

We need not determine here precisely which statements made in the article are privileged. At least a few statements would survive summary judgment as allegations of fact. Nonetheless, an early paring of plaintiff's claims is appropriate. It would isolate precisely what is at issue, help determine the scope of the discovery needed by the parties and clarify for defendant what it must prove to assert the defense of truth. All of these factors will tend to reduce the costs incurred by defendants here, and by libel defendants as a group, thereby diminishing the threat that libel actions pose to aggressive journalism. The media should not be forced to engage in self-censorship for fear of the expense of defending against frivolous challenges to its editorial judgments. *See New York Times*, 376 *U.S.* at 279; *Steaks Unlimited, Inc. v. Deaner*, 623 *F.*2d. at 280 n.76 (3 Cir. 1980).

The Shield Law privilege may burden some libel plaintiffs who will not survive a summary judgment motion without discovery. It would be unfortunate if some newspersons fabricated malicious lies and then claimed immunity from liability by claiming that they relied in good faith on a confidential source whose identity they decline to reveal. Contrary to states without a Shield Law, in New Jersey a media defendant's refusal to name its source cannot support an inference that no source existed. *Cf., Downing v. Monitor Publishing Co.*, 120 *N.H.* 383, , 415 *A*2d. 683, 686 (1980) (creating a presumption to that effect in the absence of a statutory privilege). However, similar burdens have attended the entire expansion of constitutional protection for libel defendants, beginning with *New York Times v. Sullivan*. This Constitutional protection

> administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test. Despite this substantial abridgment of the state law right to compensation for

> wrongful hurt to one's reputation, the Court has concluded that the protection of the New York Times privilege should be available . . . .
>
> [*Gertz v. Welch*, 418 *U.S.* at 342-43]

The New Jersey Shield Law does not entirely foreclose any prospective plaintiff's right to maintain a cause of action. An absolute Shield Law privilege gives newspersons less than absolute immunity from suit. In some circumstances, public figures will be able to establish by inferential evidence the recklessness necessary to sustain a libel judgment. When a plaintiff can show that a defamatory report was published, and the author claims reliance solely on confidential sources, the trial court should consider whether the circumstances surrounding the publication warrant submission of the question of actual malice to the jury. The defendant in such cases, although under no legal duty to reveal its sources, may decide to do so to rebut an inferential showing of actual malice.

"Actual malice" does not mean that the defamatory falsehood was published with ill will, but rather that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan, supra,* 376 *U.S.* at 279-80. Reckless disregard for the truth may appear when a published report

> is based solely on an unverified anonymous telephone call . . . [or] when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.
>
> [*St. Amant v. Thompson*, 390 *U.S.* 727, 732 (1968) (footnote omitted)]

A finding of actual malice may not be based solely on the character of the published statement. *Washington Post Co. v. Keogh, supra,* 365 *F.*2d at 970. Nor may it be based solely on the publisher's failure to seek independent verification of the

information. *St. Amant v. Thompson, supra,* 390 *U.S.* at 731. The two in combination, however, may support a conclusion of recklessness. Public figure libel plaintiffs can recover for

> a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.
>
> [*Curtis Publishing Co. v. Butts,* 388 *U.S.* 130, 155, reh. den., 389 *U.S.* 889 (1967) (holding it reckless to allege that respondent football coach "fixed" a game when defendant publication failed to investigate reports that allegation was false)]

Thus, an inference of actual malice may arise when a false report is published solely in reliance on confidential sources if (1) the content of the report is such as to be defamatory as a matter of law, (2) the defendant knew or should have known of some reasonable means of verifying its accuracy, and (3) the failure to verify rises to the level of a gross violation of the standards of responsible journalism.[11] If the recklessness approaches the level of publishing a knowing, calculated falsehood, the decision whether the defendant acted with reckless disregard for the truth should be submitted to the jury. *See Lawrence v. Bauer,* (slip op. at 25-26).

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[11] Contrary to the dissent's assertion, slip op. at 13, failure to verify will often be provable without the necessity of discovery. In some cases, the defendant will indicate who was contacted to verify the claims made. In many other cases, it will be clear from the allegations made from whom verification would likely be sought. Here, for example, plaintiff could show whether defendant contacted the sergeant-at-arms of the Senate of the Legislative Ethics Committee to verify the factual allegations in defendant's article about their actions involving Senator Maressa.

VI

We recognize that our holding may be unfair to certain defamed individuals who cannot meet the difficult burden of proving reckless falsehoods without discovery. But the Legislature has determined that the competing interest in a free press outweighs the possibility of damaged reputations. Since defamation is a common law action without a constitutional foundation, the Legislature has the power to limit that action in favor of the right of freedom of press.

Our Constitution grants the press wide freedom because we believe that the public interest is served by an informed citizenry. Those responsible for informing the public can discharge their function best when they can publish without anyone looking over their shoulders. The media must meet stringent deadlines, and it is inevitable that they will occasionally publish an inaccurate statement. The State House is no place for the meek and thin-skinned. Sometimes published statements will hurt. Sometimes they will turn out to be untrue. Nevertheless, those regrettable consequences must yield to the need for an informed citizenry.

When a Legislature protects a free press, it fortifies the foundations of our representative democracy. To permit government to restrain the press is to tempt government to act without restraint. A government that frees the press from restraining influences is a blessing without disguise. It fosters the criticism of official conduct that is necessary to make government responsive to citizens. That is why democracies do not punish inaccurate speech.

Justice Brandeis knew "that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth; . . . and that the fitting remedy for evil counsels is good ones." *Whitney v. California,* 274 *U.S.* 357, 375, 71, *L.Ed.* 1095, 1105-06 (Brandeis, J., concurring). The remedy of libel judgments has a role in our democracy; it compensates individuals for their injured reputations. But only free expression can preserve a democratic nation. Money awards are a medium of financial recompense. But free speech is the national currency. Our legislators have advanced this country's goals by protecting the press even at the

cost of reducing their own protection against its attack. Their action would have stirred the former president of this country who said that "were it left to me to decide whether we should have government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." *The Life and Selected Writings of Thomas Jefferson* 411-12 (A. Koch & W. Peden, eds., 1944).

Every libel law and every law affecting libel actions, including the New Jersey Shield Law, must balance important competing interests. We in no way seek to minimize the individual's interest in protection of his or her good name, which "reflects no more than our basic concept of the essential dignity and worth of every human being," *Rosenblatt v. Baer*, 383 *U.S.* 75, 92, 15 *L.Ed.* 2d 597, 609 (1966) (Stewart, J., concurring). But the Legislature has weighed the competing interests in a free press and the individual interest in reputation. It has chosen to give greater protection to freedom of speech, and our duty is to enforce that choice.[12]

We therefore hold that the Shield Law affords newspersons complete protection against disclosure of their confidential sources and the editorial processes leading to publication of an alleged libel. The order of the Superior Court, Law Division, is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock and O'Hern join in this opinion. Justice Schreiber has filed a separate dissenting opinion.

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[12] In fact, it has been forcefully argued that any state law allowing recovery for defamatory falsehood violates the First and Fourteenth Amendments, if applied to speech about official action or public matters. *See New York Times*, *376 U.S.* at 293, 295-96 (Black, J., concurring, joined by Douglas, J.) ("the First and Fourteenth Amendments . . . completely prohibit a state from exercising such a power . . . to impose damages for merely discussing public affairs and criticizing public officials. The power of the United States to do that is, in my judgment, precisely nil."); 376 *U.S.* at 297 (Goldberg, J., concurring, joined by Douglas, J.) (arguing for absolute privilege to criticize public officials without fear of libel action). The position of these Justices and others finds support in recent reports of an increase in the use of libel actions to intimidate those who criticize public figures. *See, e.g.*, Pell, "Libel as a Political Weapon," *The Nation*, June 6, 1981.

APPENDIX B

SUPREME COURT OF NEW JERSEY
A-74 September Term 1981

JOSEPH A. MARESSA,

Plaintiff-Respondent,

v.

NEW JERSEY MONTHLY and HENDRIX F.C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,

Defendants-Appellants.

SCHREIBER, J., dissenting.

Article I, paragraph 6 of the New Jersey Constitution safeguards an individual's right to a cause of action for defamation.[1] It is of course subject to the Federal Constitution, the Supreme law of the land. As such this right has been abridged to some extent by the United States Supreme Court's interpretation of the First Amendment of the Federal Constitution. Other than that modification the cause of action for defamation cannot be eliminated by the Legislature. Yet the majority's interpretation of the Shield Law, *N.J.S.A.* 2A:84A-21, has that precise effect in the case of public figures and public officials, despite the lip service it pays to society's interest in assuring that individuals enjoy their reputations unimpaired by false and defamatory attacks. Moreover, the language and sense of that Law do not justify that interpretation. It is for these reasons I must dissent.

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[1] It is also arguable that the right of an individual to protect his or her good name is secured by the constitutional right of "enjoying and defending . . . liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." *N.J. Const.* (1947), Art. I, §1, par. 1. I have chosen to rely on Article I, par. 6 which speaks directly to a cause of action based on defamation.

I

A cause of action for defamation was well established in the common law. Reputation was a protectible interest and the courts were available to compensate the injured person for damages attributable to libelous or slanderous statements. See L. Eldredge, *The Law of Defamation* 293-94 (1978). As the press developed and actively participated in public affairs by printing articles and comments about individuals, it naturally became the target of those whose reputations suffered at its hands. Protection of the press became a desired goal by the time the Federal Constitution was adopted. Concern focused on the liberty to print whatever one had a mind to without being subjected to prior restraint. *See* L. Levy, *Freedom of Speech and Press in Early American History* 13-14 (1963). However, accompanying the freedom was a responsibility for disseminating libelous material. Indeed, the generally accepted rule of law was that libelous utterances were not constitutionally protected speech. *Beauharnais v. Illinois*, 343 *U.S.* 250, 266, 72 *S.Ct.* 725, , 96 *L.Ed.* 919, (1952); *Roth v. United States*, 354 *U.S.* 476, 482-83, 77 *S.Ct.* 1304, , 1 *L.Ed.*2d 1498, (1957).

This accommodation between a free press and its responsibility continued substantially unimpaired until *New York Times v. Sullivan*, 376 *U.S.* 254, 84 *S.Ct.* 710, 11 *L.Ed.*2d 686 (1964), when the Supreme Court sharply reduced the press's accountability for defamatory statements made about public officials. This standard was later extended to public figures. *Curtis Publishing Co. v. Butts*, 388 *U.S.* 130, 87 *S.Ct.* 1975, 18 *L.Ed.*2d (1967). Those plaintiffs had to prove that the press knowingly printed false material or that its publication had been made with a reckless disregard for the truth. The latter element was refined in *St. Amant v. Thompson*, 390 *U.S.* 727, 88 *S.Ct.* 1323, 20 *L.Ed.*2d 262 (1968), which held that to show recklessness a plaintiff must introduce evidence "that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731, 20 *L.Ed.*2d at 267.

A plaintiff, after the substantive change in libel law effected by *New York Times*, encountered the problem of securing the evidence to meet the new heightened test. Proof of the defendant's state of mind, regarding either actual knowledge or a reckless disregard of the truth, would in all probability have to be

developed through the defendant and its employees. Such was the scene in *Herbert v. Lando*, 441 *U.S.* 153, 99 *S.Ct.* 1635, 60 *L.Ed.*2d 115 (1979).

In that case, plaintiff, a public figure, sued The Columbia Broadcasting System, Inc. (CBS), Lando, the producer of the CBS television show, and others for portraying him as a liar. Lando refused during the discovery process to answer questions involving his mental processes. These inquiries concerning (1) Lando's conclusions during his research and investigations about which leads to pursue, (2) his impressions of facts gathered from interviewees and his state of mind about their veracity, (3) the basis of his conclusions where he had reached a determination concerning the veracity of persons, information or events, (4) conversations with the coproducer about what should be included or excluded from the program, and (5) Lando's intentions as manifested by his editorial decisions. *Id.* at 157 n.2, 60 *L.Ed.*2d at 122 n.2.

The Court of Appeals for the Second Circuit concluded that because Lando's state of mind and editorial conversations were protected by an absolute constitutional privilege he need not respond to a discovery request. The United States Supreme Court reversed. Justice White, writing for a majority, reasoned that damages for defamation did not abridge the freedom of press or free speech when the *New York Times* standard was met. *Id.* at 160, 172, 60 *L.Ed.*2d at 124, 131. Thus it was proper for a plaintiff to focus discovery on a defendant's thoughts and editorial processes. "[U]nless liability is to be completely foreclosed," the thoughts and editorial processes had to be open to examination. *Id.* at 160, 60 *L.Ed.*2d at 124.

Moreover, the *Herbert* Court reaffirmed the *New York Times* doctrine which balanced the freedom of the press and the "basic concern" for the individual's interest in his reputation. *Id.* at 169, 60 *L.Ed.*2d at 129. The Court reiterated that "there [was] no constitutional value in false statements of fact." *Id.* at 171, 60 *L.Ed.*2d at 131, quoting *Gertz v. Robert Welch, Inc.*, 418 *U.S.* 323, 340, 41 *L.Ed.*2d 789, . Holding those who publish defamatory statements responsible compensates the injured and deters reckless publication of false statements. Thus *Herbert* acknowledges that broad discovery into editorial editing and processing is permissible under federal discovery rules 26(b)(1)

and 26(c) and is not violative of freedom of the press protected by the First Amendment. *Id.* at 177, 60 *L.Ed.*2d at 134.

Insofar as the First Amendment is concerned, the Supreme Court has recognized that an individual's cause of action for defamation is abridged to the extent that public officials and public figures must prove actual malice as defined in *New York Times*. The Court recognized the importance of the press's freedom, but it rejected "complete immunity from liability from defamation" since that would be "an untenable construction of the First Amendment." *Id.* at 176, 60 *L.Ed.*2d at 134. Thus it concluded that foreclosing discovery of editorial processing would be going too far at the expense of the individual who had been injured by the defamatory statement. *See* Franklin, "Reflections on *Herbert v. Lando*," 31 *Stanford L. Rev.* 1035 (1979).

II

The Supreme Court acknowledged in *Paul v. Davis*, 424 *U.S.* 693, 96 *S.Ct.* 1155, 47 *L.Ed.* 405 (1976), that there was no federal constitutionally protected right for redress from defamation in the absence of an interest "vouchsafed to him by" a state. *Id.* at , 47 *L.Ed.*2d at 420. I find that such an interest exists in New Jersey.

It must be remembered that until the adoption of the Fourteenth Amendment in 1868, there was no federal restriction on state action affecting freedom of the press. The First Amendment to the Federal Constitution applied only to Congress and the authority to legislate on freedom of the press and causes of action for defamation was left to the states. *See* Levy, *Freedom of Speech and Press, supra*, at 235. Nine of the original states incorporated provisions protecting freedom of the press in their constitutions. Four did not. Even when the state constitutions included protection for the press, it was unquestioned "that the common-law rules that subjected the libeler to responsibility for the private injury, . . . occasioned by his conduct [was] not abolished by the protection extended to the press in [the] constitutions." *Id.* at .

For example, article sixteen of the Massachusetts Constitution declared that the "liberty of the press is essential to the security of freedom in a State; it ought not therefore to be restrained in this Commonwealth." Yet, Chief Justice Parker declared in *Commonwealth v. Blanding*, 20 *Mass.* 304, (1825), that this liberty was subject to a provision in article eleven that "every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character."

Originally, New Jersey had no constitutional provision regarding freedom of the press. Common law actions for libel or slander were cognizable. *Cf. McCuen v. Ludlum*, 17 *N.J.L.* 12 (Sup. Ct. 1839). The 1844 Constitution contained a bill of rights in Article I, and paragraph 5 of that Article provided:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

This language was carried over into our present Constitution. See *N.J. Const.* (1947), Art. I, par. 6.

The Proceedings of the Constitutional Convention of 1844 reveal that the press paragraph was copied from Article VII, section 8 of the New York Constitution of 1821. 2 *New Jersey Writers' Project* 144 (1942). The constitutional convention proceedings in New York and in New Jersey contain no reference to the first sentence in paragraph 5 relating to a person's right to freely speak, write and publish subject to "being responsible for the abuse of that right."

However, that thought had been expressed similarly by others. Blackstone had stated: "Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment." 4 W. Blackstone, *Commentaries* 154 (4th Cooley ed. J. Andrews 1899). Lord Mansfield in *King v. The Dean of St. Asaph*, 3 *TR* 657, 661 (1784), had written: "The liberty of the press consists in printing without any previous license, subject to the consequence of law." Lord Kenyon in *King v. Cuthell*, 27 *Howell St. Tr.* 675 stated "that a man may publish anything which . . . is not blameable, but that he ought to be punished if he publishes that which is blameable." Odgers in his treatise on libel wrote: "Any man is free to speak or to write and publish whatever he chooses of another, subject only to this, that he must take the consequences, should a jury deem his words defamatory. This is what is meant by 'the liberty of the press.'" W. Odgers, *A Digest of the Law of Libel and Slander* 11 (1st Am. ed. Bigelow 1881). Chief Justice Parket in *Commonwealth* explained: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse . . . ." *Commonwealth v. Blanding*, 20 *Mass.* at 311.

Language comparable to the several above quotations was inserted in the New York and New Jersey Constitutions. This terminology acknowledges the press's responsibility for abusing its right to write and publish. The sense of the words is to protect those who would be defamed by irresponsible utterances.

This interpretation of Article I, paragraph 6 has been accepted by those courts which have reflected on it. In *Leers v. Green*, 24 *N.J.* 239 (1956), Justice Heher commented:

> In this [statement in the Constitution] we have the very essence of the freedom of speech and of press secured by the 1947 State Constitution, Article I, paragraph 6, holding the actor "responsible for the abuse of that right," (derived from the 1844 Constitution, Article I, paragraph 5) and also by the First Amendment to the Federal Constitution. [*Id.* at 254]

Sprinkled throughout our reports are other comments reflecting the substantive constitutional protection afforded the individual when the freedom of speaking, writing and publishing has been

abused. *See, e.g., State v. Boyd*, 86 *N.J.L.* 75, 79 (Sup. Ct. 1914) ("language tending to the violation of the rights of personal security and private property and toward breaches of the public peace is an abuse of the right of free speech for which by the very constitutional language invoked, the utterer is responsible"); *Coleman v. Newark Morning Ledger Co.*, 29 *N.J.* 357, 379 (1959) (reaffirming language of *Leers*).

The people of New Jersey have carefully guarded the individual's right to damages for libelous statements. The Legislature has not abolished a cause of action for public figures or officials and I submit that it could not do so since the cause of action is constitutionally protected. The majority interprets the Shield Law, *N.J.S.A.* 2A:84A-21, to provide that the newsperson's statutory privilege covers the source, the information (whether disseminated or not) and editorial processes. As a result, in most cases a plaintiff's ability to develop evidence relevant to the state of mind of the defendant will have been eliminated and thereby his constitutionally protected cause of action will have been obliterated.

Justice White commented in *Herbert* on the far-reaching effect of precluding a plaintiff from utilizing discovery with respect to editorial processing. He observed that by placing beyond plaintiff's reach a range of direct evidence relevant to providing knowing or reckless falsehood by the publisher of an alleged libel, elements critical to plaintiffs may not be proven. He noted that foreclosing discovery of editorial processes would erect "an impenetrable barrier to the plaintiff's use of such evidence" and "is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with 'convincing clarity.'" 441 *U.S.* at 170, 60 *L.Ed.*2d at 130. The majority asserts that the plaintiff may prove recklessness by showing that the publisher failed to seek independent verification of serious charges. However, the difficulty is that the plaintiff will not be able to prove the necessary ingredients. The reporter need not disclose the source, need not disclose his method of verification, need not disclose the identities of the verifiers, if any, need not explain why he considered the sources responsible, and need not

disclose his editorial processing in whole or in part. A reporter, refusing to divulge any of this information, may comfortably rely on the assertion that his source, albeit only one, was reliable, thereby leading to the termination of the proceeding. *See Edwards v. National Audobon Society, Inc.*, 556 *F.*2d 113, 120, (2d. Cir. 1977). An interpretation of the Shield Law which does what the Supreme Court in *Herbert* refused to do effectively eliminates a public official's or public figure's[1] cause of action for defamation and conflicts with the state constitutional protection given to those individuals who have been wrongly and intolerably damaged by the "abuse of the right" of freedom of the press.

However, this interpretation of the Shield Law is not necessary or warranted. The statute reads as follows:

> Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.
>
> a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated or delivered; and
>
> b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated. [*L.* 1977, *c.* 253, §1, eff. Oct. 5, 1977; *N.J.S.A.* 2A:84A-21]

A careful reading of the statute indicates that the key to subdivision (a) is the identity of the third person who acted as a conduit of the information. The statute focuses on that identification, not on what the defendant newsreporter may do with

[1]The broad definition of a "public figure," *Lawrence v. Bauer*, *N.J.* (1982), makes the constitutional violation even more egregious.

the information. Subsection (a) does *not* refer to the defendant newspaper person's editorial processes. It does *not* refer to *his* impressions of the facts gathered, *his* conclusions of their veracity, or *his* intentions as manifested by his editorial decisions.

In addition to the fact that the language of the statute does not support the interpretation placed upon it by the majority, the legislative history contains no suggestion that the Legislature intended to foreclose discovery into the defendant's editorial processing. I do not believe the Legislature intended to adopt the "stunning" proposition that the defendant has an absolute privilege to resist the most direct form of inquiry into the precise matter the plaintiff is required to prove with "convincing clarity." *See* Comment, "*Herbert v. Lando:* Reporter's Privilege From Revealing the Editorial Process in a Defamation Suit," 78 *Colum. L. Rev.* 448, 453 (1978). As Justice Brennan in his dissenting opinion in *Herbert v. Lando* observed: "It would be anomalous to turn substantive liability on a journalist's subjective attitude and at the same time to shield from disclosure the most direct evidence of that attitude." 441 *U.S.* at 192, 60 *L.Ed.*2d at 144. If there be any guide it is that the Legislature is aware of the principle that evidentiary privileges are not favored, precluding as they do a "rational means for ascertaining truth." *Elkins v. United States,* 354 *U.S.* 206, 234, 80 *S.Ct.* 1437, , 4 *L.Ed.*2d 1669, (1960) (Frankfurter, J., dissenting). *See also United States v. Nixon,* 418 *U.S.* 683, 94 *S.Ct.* 3090, 41 *L.Ed.*2d 1039 (1974); 8 *Wigmore, Evidence* §2192 (McNaughton rev. 1961).

The majority asserts that occupants of the State House, including members of the state Legislature, should not be "meek and thin-skinned." Yet it is more than the meek and thin-skinned who may refuse public office rather than expose themselves to possible public contempt and ridicule by an irresponsible reporter. Apparently persons within these categories should henceforth disqualify themselves from accepting any public office. Even more devestating is the fact that the *Maressa* doctrine will be applied to ordinary citizens attempting to voice their views in town meetings. *See Lawrence v. Bauer,* *N.J.* , (1982) (Shreiber, J., dissenting).

I would affirm the trial court's order that defendants respond to those interrogatories and depositions addressed to their respective editorial processes.

APPENDIX C

PRINCIPATO & HANIFEN
519 Federal Street
Camden, New Jersey 08103
(609) 964-0405

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAMDEN COUNTY
DOCKET NO. L-18536-79

JOSEPH A. MARESSA,
Plaintiff,

v. Civil Action

NEW JERSEY MONTHLY and HENDRIX F.C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS jointly, severally and in the alternative,
Defendants

ORDER

This matter being opened to the Court by Benjamin Goldstein, Esq., of the law firm of Principato & Hanifen, attorneys for the plaintiff herein, and in the presence of Robert A. Felmeister, Esq., of the law firm of Brener, Wallack, Rosner & Hill, attorneys for the defendants herein, and the Court having read and considered the briefs of counsel, together with their respective attachments, and having further heard and considered the arguments of counsel; and

The court having found that the privileges raised by the defendants either do not apply relative to this matter — specifically, that the First Amendment to the United States Constitution does not apply to this malicious libel suit and that therefore, it confers no privileges upon the defendants herein to

refuse to disclose sources and other information, or, that any such privilege has been effectively waived by the defendants herein, and for good cause shown;

IT IS on this 15th day of October, 1980, ORDERED, as follows:

1. That the plaintiff shall serve upon the defendants a new set of Interrogatories composed of questions from plaintiff's prior set of Interrogatories and from the depositions of the defendants to which defendants failed to respond on the basis of their alleged privileges;

2. That within twenty (20) days from the date of service of said Interrogatories, the defendants shall answer same unless the defendants object to any of said questions;

3. In the event the defendants fail or refuse to answer any of said questions, plaintiff may proceed by Notice of Motion to require sanctions from the Court.

RUDOLPH J. ROSSETTI, J.S.C.

RUDOLPH J. ROSSETTI, J.S.C.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — CAMDEN COUNTY
DOCKET NO. L-18536-79

APPELLATE DOCKET NO. A-1486-80-T02

JOSEPH A. MARESSA,
Plaintiff,

vs.

NEW JERSEY MONTHLY and HENDRIX F.C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative.
Defendants.

TRANSCRIPT

OF MOTION

June 27, 1980

BEFORE:

HONORABLE RUDOLPH J. ROSSETTI, J.S.C.

APPEARANCES:

BENJAMIN GOLDSTEIN, ESQ.
Attorney for Plaintiff

ROBERT A. FELMEISTER, ESQ.
Attorney for Defendants

GREGORY P. KAMARAS, CSR
Official Court Reporter

Camden County Court House
Camden, New Jersey

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THE COURT: Mr. Felmeister, what am I going to do about this Brogan Case and Beecroft Case?

MR. FELMEISTER: Would you like me to begin, Your Honor?

THE COURT: Yes.

MR. FELMEISTER: I think — well —

THE COURT: Beecroft is not binding on me. I understand that.

MR. FELMEISTER: Yes.

THE COURT: Anything about the reasoning of that trial Court that you think is fallacious, I can disregard it?

MR. FELMEISTER: Yes, Your Honor, I do. I believe, firstly, the Beecroft Case relied very heavily on Brogan and I think Brogan is very much distinguishable on a factual basis from both Beecroft and the case before us today. In Brogan, the Court, the case was at trial. The defendant was on the stand testifying.

THE COURT: Why does that make a difference?

MR. FELMEISTER: Well, I think Beecroft is saying that the mere raising of an affirmative defense somehow is a waiver of a privilege. I think it's very different from actually introducing evidence obtained from sources to prove your affirmative defense. Affirmative defense, such as truth, for example, could be proven by an independent means. It would not — there wouldn't have to be any waiver, you wouldn't have to waive your privilege to actually prove it at trial.

Of course, if you try to use your source, to have you testify as to information revealed from a source at the trial, you'd be waiving the privilege and I think we'd have no question here that there would be a waiver within the meaning of the rule, Rule Thirty-Seven, which is what happened in Brogan. I think that Beecroft in a sense of fairness to the plaintiff, which is what the Court discusses greatly, misconstrued Brogan, because there was

a waiver in Brogan. They gave up information. The Court said: You can't give up what information you would like to give out, and then hold back the rest.

In this case we have not given out any information revealed from our sources and we don't intend to, because that would be a waiver under Rule Thirty-Seven. There was such a waiver in the Brogan Case. Fairness, as I mentioned in the brief, Your Honor, I don't believe that fairness is the sole issue before the Court. When you're talking about a constitutional question that you have the societal interest, the public interest in the unfettered process of news gathering and news dissemination, against the one interest of a plaintiff in a defamation suit. I mentioned in my brief Steaks Unlimited versus Deaner, which in a discussion — it's a Third Circuit Case in a discussion of the Pennsylvania Shield Law, which is similar, very broad in scope, similar to the New Jersey Shield Law, expressed approval of the legislative intent to show that there is a more important interest at stake with the constitutional issue, more important issue at stake with the potential harm of allowing a disclosure of sources that will have a chilling effect —

THE COURT: We're not dealing with a constitutional dimension in a malicious libel, are we?

MR. FELMEISTER: I believe we are, because we're denying that there is a malicious libel. I think it's clear that in the Federal Cases — I think we have two privileges, first of all. They're separate and apart. One is the First Amendment privilege which is a qualified privilege under the First Amendment of the United States Constitution: and, secondly, we have a privilege under the New Jersey Shield Law which I feel is an unqualified privilege. I think if you read the Farber Case very closely, they indicate, the Court indicates, although they're discussing a criminal matter, that their reading of the legislative intent in the Shield Law is that they intended to make the privilege from refusing to disclose sources as broad as is possible under the United States Constitution and under the State Constitution.

THE COURT: But doesn't the Shield Law, doesn't Farber deal with a criminal prosecution?

MR. FELMEISTER: Yes, and I believe they felt in that case —

THE COURT: But isn't there a distinction between a criminal prosecution and a libel?

MR. FELMEISTER: I believe there is, Your Honor. And I believe that's why the State Supreme Court made the exception in the interest of a criminal defendant. They felt that was an overriding interest, but nothing else. That was a distinction that under the Sixth Amendment rights and similar rights of the New Jersey Constitution, that there was an overriding right of the criminal defendant to a fair trial. But there are no other exceptions to this.

THE COURT: How can you say that in face of Brogan? Doesn't Brogan carve out another exception?

MR. FELMEISTER: I don't believe Brogan did, Your Honor. I don't really believe Brogan did. I believe really if you look at what happened in Brogan there was a totality of the raising of an affirmative defense, and then testifying as to certain information revealed from these sources, I think it's quite different.

And secondly, I don't believe that Brogan did carve out an exception to this rule. I do not believe that there is such an exception. I believe there was a waiver and if we did the same thing in this case, testified as to certain information revealed from a source but then refused to reveal the name of the source, and refused to disclose additional information, we would waive the privilege under Rule Thirty-Seven under the rules of evidence.

THE COURT: Isn't that what you did? That you interviewed certain people?

MR. FELMEISTER: That's not the disclosure of any information received. That's more similar to the method of the editorial process that's discussed in Herbert versus Lando. We disclosed, well — I think the Supreme Court indicated there that editorial process, I think, is similar to the method of compiling the article. We told how it was done, to show there was a good faith effort in the way the article was compiled. It was done by

interviews of a certain number of people. We told the types of people, very broad categories of people that were interviewed. Never any disclosure of any information that would be seen as privilege within the New Jersey Statute. The New Jersey Statute allows — refuses to disclose the information received from the source, and the identity of the sources and we did not disclose any such information.

And secondly, Your Honor, I do believe strongly there is this qualified privilege in New Jersey. Under the First Amendment privilege, it's in the Notice of Motion of the plaintiff, we don't even know what they're asking for disclosure of. This defamation suit is based on an entire magazine article with numerous statements of fact and opinion. If the Court —

THE COURT: Didn't I see in the answers given such answers as —

MR. FELMEISTER: They're very broad questions, Your Honor. Very broad questions, Your Honor, but I feel it discloses the information. There may be statements of fact in the article which are untrue, but which as a matter of law are not defamatory. That certainly would not be relevant to this case, and the source of that information could not be seen as going to the heart of the matter and should not be required to be disclosed. There may —

THE COURT: Supposing, if you will, that your reporters talk to a hundred people, all of whom unanimously say: Senator Maressa is a fine, upstanding gentleman, and then your reporter writes this article. Might that be indicative of a malicious intent on the part of the reporter to ignore all the input he had or she had and then write the article in that fashion? And if that be so, how can the plaintiff ever determine that without some discovery?

MR. FELMEISTER: I still believe, Your Honor, that the plaintiff has to specify under the First Amendment privilege, to specify the particular sources for which information they're seeking, first of all, specifically which information. I don't believe in any respect that Your Honor would be justified in making a broad scope order requiring us to let them see our entire file. Let us see the notes of all our interviews and let us have the names of every interviewee that was used in this article.

THE COURT: We're right now trying to deal with concepts. If we determine that the privilege has been waived, generally, then it would seem to me we are going to end out going question by question. But we have to get past this initial roadblock, if you have it, we don't have to worry about the question.

MR. FELMEISTER: I don't believe its been waived, Your Honor. I don't believe there has been a disclosure of any information revealed by any source in this article, by saying that they interviewed lobbyists, administrative aides, court liaisons, it's just an example of the method of compiling this article.

THE COURT: But if you look in the deposition of TEMS, there's all sorts of things it seems to me about a discussion with an informed Trenton observer.

MR. FELMEISTER: But that would not be, even been privileged under the New Jersey Statute, Your Honor, because that is not the identity of a source, and that's not information revealed and unless you give out something that's privileged you haven't waived the privilege. I don't believe that would be privileged within the meaning of the statute.

THE COURT: But who's to make that judgment: you? That's what troubles me. Who makes the judgment, the reporter? As to what is privileged and what isn't as to what is a waiver and what isn't?

MR. FELMEISTER: What is a waiver, Your Honor, certainly it's Your Honor's decision to decide whether or not there's been a waiver of the privilege by the revealing of any, any information. I don't believe that there has been. I think an example of the only — the tremendous burden that should be placed on a plaintiff before anything is revealed is the new exception to the Shield Law in light of the Farber decision which puts a very heavy burden on a plaintiff to show by a preponderance of the evidence that certain number of the categories that the specific need for the items that they request and have to show specifically what they're looking for. That they cannot obtain it at all without any other means, and at that point that's how, how far they have to go to just get an in camera inspection by the Court.

THE COURT: I suggest to you the First Amendment right that was dealt with in Farber is not available on malicious libel.

MR. FELMEISTER: Well, Your Honor, I think the cases cited in my brief and the cases such as Riley versus Chester, numerous cases that were cited were all libel cases which clearly showed that this was a — the First Amendment case does apply to libel cases. Garland versus Terri, nineteen fifty-eight, US — Second Circuit case which is a case still being cited by many courts, the Supreme Court. It does apply. Herbert versus Lando, Your Honor, was a libel case and I believe the Court used the same balancing test in Herbert versus Lando that must be used today under the First Amendment privilege. And in that instance, they found that the editorial process which I'm contending is similar to the process of revealing the methods of compiling the article, discussions between the authors, we have not refused to answer any of those questions, that they felt that there would encourage the free flow of truthful information. Because if people would have to reveal the methods upon which they used to compile the articles, and the discussions they had about the articles, the discussions that: Well, let's ignore some facts, and let's use other facts, whatever they were, their conclusions, that balanced in favor. But Mize versus McGraw-Hill, another libel suit cited Herbert — that was the case where the motion to compel discovery was denied. It's a March nineteen eighty Federal District Court Case. And in light of Herbert there was a motion for reargument and the Court felt it made no difference. Herbert did not change the law regarding disclosure of sources. They balanced the interest and found with regard to editorial process it weighs in favor of the claimant of the information. But they made a clear distinction between that and the disclosure of sources which they felt might have a chilling if not a freezing effect upon the gathering of information and the dissemination of information. I believe my brief cites numerous examples of the, the intent of the Court to protect the First Amendment rights. And in Mize, the Court denied the motion, because there was not a showing at all for even the Court to balance the interest. That was a libel case, there are numerous other examples of libel cases in the brief where a First Amendment privilege clearly does exist, although it is qualified.

THE COURT: Granting you that Brogan is not factually identical, and assuming that that the Court has to look to whatever the Supreme Court has said, there's some guidance, what do you suggest this Court to do with the language of Brogan: for example, at page one fifty-two, where the Court said: A newspaper ought not to be able to give and take what it chooses when its own acts bring into question a liability on its part to others. If permitted to do so as defendant has here, the newspaper could give whatever information was favorable to its position and then plead the privilege to prevent any disclosure of the detrimental facts.

MR. FELMEISTER: I think, Your Honor, the — based upon that decision, I think is what would happen in this case. My clients if they failed to, if they insist on claiming their privilege will be precluded obviously from giving out any of the information as the defendant did in the Brogan Case.

THE COURT: Well, you've already given some in the deposition.

MR. FELMEISTER: I don't really believe that we have, Your Honor, information within the meaning of the statute, information revealed from a source. I don't believe we have.

THE COURT: I don't follow that.

MR. FELMEISTER: I don't believe we have given out information revealed from a source. Meaning some factual information that was used as a basis for an opinion in the article, or which was used as a statement of fact in the article. By stating that they interviewed lobbyists and administrative aides is not at all revealing sources from specific — strike that, information from specific sources.

THE COURT: But isn't the fair inference that those interviews were the source of the information which was the basis of the article.

MR. FELMEISTER: There's no question that the interviews were sources of information, that there were interviews that were sources of information from the article. But I think

that goes into this — it's similar to the editorial process, Your Honor. It's — I don't think there is a privilege under the New Jersey Statute to withhold a method that you use in compiling an article. And that's what we gave. And by giving something that was not privileged, I don't think it's a waiver of a privilege.

THE COURT: Depends gentlemen on what we decide today.

MR. FELMEISTER: Yes, Your Honor, it does.

THE COURT: Anything else?

MR. FELMEISTER: Well, Your Honor, I just would, just to repeat briefly, I feel the statutory privilege is unqualified, has not been waived, and under the First Amendment test, there's certainly no information before the Court upon which it can use the balance, the interest, the sources for specific information. Neither test, I believe, has been, has been met and I think in the light of the Farber decision and the recent amendment to the Shield Law clearly shows the intent to make no exceptions to this Shield, absolute, unqualified privilege of the Shield Law, except the right of a criminal defendant for a fair trial at this point Your Honor in New Jersey Law. I believe, that's been approved by the Third Circuit in Steaks Unlimited versus Deaner. And I believe, one other thing Your Honor in Bransburg versus Hayes, US Supreme Court which is often cited in the cases about the First Amendment privilege, the Court did mention the fact that there is nothing in the US Constitution which would prohibit a state from making an absolute privilege to withhold sources. And I believe, the State did do that. That's all.

Thank you, Your Honor.

THE COURT: The record should reflect that I have received and reviewed the briefs of both sides in this matter, and I compliment both counsel on some excellent lawyering in those briefs. It's a pleasure in the avalanche of paper that we get to get such good work. And in connection with that review, it seems to me that the Brogan Case, although it is not on all fours as we say factually, gives a great deal of guidance to this Court in this particular case and it is my view that the rationale of Beecroft, although it is not binding upon this Court, is rationally compelling and I would adopt the reasoning of that court in connection

with this case. And without reciting all of the Brogan Case, I think the language on page one fifty-two and one fifty-three is just too compelling that in a suit for defamation or libel, the — where the plaintiff seeks punitive damage, the defendant cannot allege fair comment, cannot divulge some very basic information and then decide when he will stop or when it will stop. It appears to me in the review of the interrogatories and the depositions of which for the most part seem to be a part of what was presented to this Court, that enough was given by way of basis for the article, by way of editorial process, that the defendant in this case has in accordance with the Brogan reasoning waived its privilege to the extent of this discovery.

Now, I make that ruling only as a general concert. That the privilege is not absolutely available to the defendant. I hope that given that basis, counsel will be able to handle the specific questions. But if that's not possible I suspect we're going to have to take them question by question in an attempt to get specific rulings.

What's your feeling on that, do you think given that ruling you're going to be able to —

MR. FELMEISTER: Your Honor, unfortunately, I don't think we are going to be able to reveal any of the sources of the article. I have problems with the reporters themselves who have in the course of their dealing with sources, they tell them that this is confidential, and I think that it, that they intend to stand on their First Amendment and the statutory privilege. I think there would be a problem, I don't think there's any way that I can consent to what, based upon this, to work out an agreement with counsel, I would not have authority to do it on behalf of my clients, it would be impossible.

THE COURT: Well, there are specific questions that were the subject of these motions; and, of course, there are specific questions in the depositions that answers were refused upon. And quite frankly, I'd rather not take the time this morning to take each one and apply the concepts that we have to give a ruling on each one. And you're saying that you're representing that notwithstanding the order of this Court, your clients are still going to refuse to give the information.

MR. FELMEISTER: Yes, Your Honor, I believe they

would. I believe they would ask me to appeal any decision requiring them to reveal any sources of information respectfully.

THE COURT: Well, supposing we give this matter a date for the argument on the individual questions, and individual depositions, at which time, it seems to me you should produce the persons who would be in a position to comply with the order of the Court, and have them make their decision then whether they're going to comply or whether the Court will have to invoke sanctions for compliance.

MR. FELMEISTER: I'm not sure I understand, Your Honor, you would want a hearing or —

THE COURT: Well, I have to make specific rulings on specific questions.

MR. FELMEISTER: Yes, Your Honor.

THE COURT: I have ruled as a general concept that in this case and under these circumstances your client has waived its privilege, under the Court rule.

Now, of course, we get the specific questions, we deal with relevance, we deal with whether as to that specific question there was a waiver. And it's, I think, that that will require specific argument on each question and each refusal.

MR. FELMEISTER: Could Your Honor set it for another date, whereby since the plaintiff didn't spell it out in his brief, could we have the plaintiff first spell it out in a — some other moving papers, and give us a chance to respond to it that way, is that what Your Honor is suggesting?

THE COURT: I have specific questions which I thought were the subject of this motion.

MR. FELMEISTER: Okay. The ones referred to on page three of the plaintiff's brief? There is a list of questions, they weren't in the Notice of Motion, but they are referred to on page three of the brief, just a number, the numbers of the questions, and pages of the transcript of the deposition.

THE COURT: Page three of his brief?

MR. FELMEISTER: Yes, sir.

THE COURT: Right. Well, we're talking like he's not right here. Are they the only ones, that appear on page three of your brief?

MR. GOLDSTEIN: Judge, those are the only ones that they refused to answer, and frankly, I feel that those questions are broad enough to, to include what the defendant is talking about.

However, I have no objection to submitting perhaps a supplemental list of actual questions that I would wish to have answered and maybe the Court can deal with it that way, rather than just address itself to the depositions and have to go back and forth.

THE COURT: I would prefer that, I think it would clarify the issues for all of us.

MR. GOLDSTEIN: All right.

THE COURT: Why don't you do that. You submit specific questions in light of the Court's ruling this morning.

MR. FELMEISTER: Would this be limited to those questions unanswered at the deposition and interrogatories, Your Honor?

THE COURT: He's going to incorporate them by way of the interrogatories, that's the impression I have, the questions at the depositions that were not answered, he will ask by way of interrogatory and then we'll have it in the exact framework of questions propounded and the refusal. So that, it seems to me does not require this Court to retain jurisdiction. If they're unanswered, make another motion to compel.

Now, if you're representing that notwithstanding what this Court does, your client is going to refuse to comply, then I would suggest that the return date of that motion you bring in the people that would be in a position to comply.

MR. FELMEISTER: Well, if Your Honor would, would order them to reveal sources, would Your Honor grant a stay pending any appeal?

THE COURT: Well, I don't know what I'm going to rule. I don't want to make any declaratory judgment.

MR. FELMEISTER: So this would be — so I understand it, they're going to serve another — essentially another set of interrogatories with the questions that were — just putting together on one list the questions that were unanswered both in the interrogatories and the depositions? And they will be required to bring another motion if we don't answer them?

THE COURT: Yes.

MR. FELMEISTER: Okay.

MR. GOLDSTEIN: Judge, may I ask that the Court grant a time limit less than the normal sixty day rule to get a response from them, rather than have me to serve these things and wait sixty days to see if they're going to answer or not?

THE COURT: Sounds reasonable, doesn't it?

MR. FELMEISTER: I have no objection to that, Your Honor.

THE COURT: Twenty days?

MR. FELMEISTER: I believe twenty days would be fine.

MR. GOLDSTEIN: One other thing, if counsel doesn't mind, this was also the return date of a motion on the defendant under Rule One Sixty-Two to compel more specific answers to our interrogatories. We've had an opportunity to confer and we would have no objection to Your Honor signing such an order if the fourteen days provided for in plaintiff's order could be thirty days.

MR. FELMEISTER: There's no objection to that.

THE COURT: That's defendant's request for more specific answers?

MR. FELMEISTER: Yes, I've already submitted an order requiring an answer within fourteen days, we agree to the thirty.

THE COURT: The thirty day order is allowed.

MR. GOLDSTEIN: Thank you.

THE COURT: Well, I thought perhaps you had your basis for appeal right now. But I'm sure the Appellate Division would prefer to have specific questions and answers.

MR. FELMEISTER: I think so, Your Honor. I think so.

THE COURT: It's a relatively new case, so I guess we'll have to do it that way.

MR. GOLDSTEIN: Twenty days should be fine. Thank you, Your Honor.

MR. FELMEISTER: Thank you.

I, GREGORY P. KAMARAS, CSR and Official Court Reporter, do hereby certify that the foregoing is a true and accurate transcript of my original stenographic notes to the best of my knowledge and belief.

GREGORY P. KAMARAS, CSR

DATE: 12/13/80

Office - Supreme Court, U.S.
FILED
SEP 15 1982
ALEXANDER L. STEVAS
CLERK

No. 82-197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH A. MARESSA,,
Petitioner,
vs.

NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,
Respondents

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. As a matter of constitutional law, does *Herbert v. Lando*, 441 U.S. 153 (1979), prohibit a state from enacting an absolute privilege by statute against compelled disclosure of a media defendant's news sources and editorial processes in a civil action for defamation?

2. Does the enactment of an absolute statutory privilege against disclosure of news sources and editorial processes by media defendants abolish the right of public officials and public figures to bring civil actions for defamation; and does such a privilege deny equal protection of due process of law to such plaintiffs?

3. Is the judgment appealed from in this case a "final judgment" which can be reviewed by writ of certiorari by the United States Supreme Court pursuant to 28 U.S.C. Section 1257(3)?

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STATEMENT OF THE CASE

This civil libel action arises out of an article published in the October 1979 issue of New Jersey Monthly magazine, then published by N.J.M. Associates. The article, entitled "Rating the Legislature", was essentially an editorial article of opinion whereby the magazine, after research and interviews, evaluated various legislators from the 1978-79 New Jersey Legislature. The magazine picked ten "Best" and ten "Worst" legislators, and provided short pieces about each legislator explaining the reasons for each categorization.

One of the legislators rated as being among the "Worst" was plaintiff, here petitioner, Joseph Maressa, then a senator from the Fourth District. Petitioner responded in December 1979 by filing a defamation complaint against the above-named defendants, here respondents, alleging that the entire article, insofar as it concerned him, was false and libelous. He further alleged that respondents made no inquiry or investigations concerning the allegations published in the article.

The course of this litigation was diverted for some two years due to petitioner's attempts to gain access to respondents' confidential sources, notes, and editorial processes and documents. Respondents maintained that these items were privileged under the New Jersey Shield law, N.J.S.A. 2A:84A-21 (Pet. at 4), as well as the New Jersey and United States Constitutions, but nonetheless permitted depositions of the three authors of the article, namely, Teresa Carpenter, Harvey Fisher, and Robert Narus.

Petitioner originally obtained from the Superior Court, Law Division, Camden County, an order requiring respondents to produce the discovery materials requested. (Pet. App. 33a) Respondents sought and were granted an interlocutory appeal of this ruling to the Appellate Division; the Supreme Court directly certified the matter. On May 6, 1982, the Supreme Court of New Jersey ruled, in pertinent part, that the New Jersey Shield Law granted an absolute privilege to respondents

not to disclose their confidential sources, editorial documents and editorial processes, in the absence of a conflicting constitutional interest. *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982). (Pet. App. 1a) The New Jersey Supreme Court explained that defamation plaintiffs had no countervailing constitutional right in their reputations which had to be balanced with the Shield Law, citing *Paul v. Davis*, 424 U.S. 639, 712 (1976). *Maressa, supra*, 89 N.J. at 191 (Pet. App. at 11a-12a). The court suggested that most of the case could be eliminated by summary judgment. *Id.* at 196-98 (Pet. App. at 17a-18a).

After this decision, but before the present petition for certiorari was filed with this Court, respondents brought a motion for summary judgment in the Supreior Court, Law Division, Camden County (Resp. App. 1a), arguing that most of the statements of which petitioner complained were constitutionally-protected opinions under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), and that the factual statements concerning plaintiff were accurate, thus precluding a finding of actual malice. This motion is still pending as of the date this reply brief is being filed. If granted, it will completely dispose of this action on the merits.

SUMMARY OF ARGUMENT

1. The present petition sets forth no substantial federal question which would allow this Court to grant a writ of *certiorari*. The decision of the New Jersey Supreme Court is wholly in accord with settled case law of this Court and is based principally upon state law.

2. The construction given by the New Jersey Supreme Court to the New Jersey Shield Law (N.J.S.A. 2A:84A-21 *et seq.*) does not deny petitioner due process or equal protection of the laws, as he has no constitutional right to his reputation and has asserted no violation of any other constitutionally protected interest to which due process or equal protection guarantees should attach. Petitioner's "equal protection" argument was not raised at any point in the state court proceedings below.

3. The decision below is interlocutory in nature and therefore is not "final" for purposes of review in this Court pursuant to 28 U.S.C. Section 1257(3).

4. The petition does not meet the requirements of Rule 21 of the Rules of the Supreme Court.

REASONS FOR DENYING THE WRIT

I. No Substantial Federal Question Is Presented By The New Jersey Supreme Court's Interpretation Of The New Jersey Shield Law, N.J.S.A. 2A:84A-21 et seq.

Petitioner appears to suggest that *Herbert v. Lando*, 441 U.S. 153 (1979), as a matter of constitutional law, prohibits a state from enacting any shield law whatsoever, especially one which protects a media defendant's editorial processes from compelled disclosure in civil defamation actions Pet. at i, 15, 17). (The confidentiality of news sources was not at issue in the *Herbert v. Lando* decision.)

Herbert v. Lando holds only that the First Amendment does not compel an absolute privilege to withhold editorial processes. *Herbert v. Lando, supra,* 441 U.S. at 175; *Maressa v. New Jersey Monthly,* 89 N.J. 176, 189 (1982) (Pet. App. at 10a). The entirety of Justice White's opinion sets forth the policy reasons why, solely as a matter of federal law, this Court chose not to create such a privilege. But the *holding* of *Herbert v. Lando* was not made binding on the states as a matter of federal constitutional law. As the Third Circuit Court of Appeals recognized in *Steaks Unlimited v. Deaner,* 623 F.2d 264 (3d Cir. 1980):

> "In *Herbert,* the Supreme Court held that the First Amendment did not *require* the federal and state courts to adopt an absolute discovery privilege from material implicating the "editorial process' — that is, for material that directly reveals the defendants' subjective state of mind. ...The Court did not hold, however, that it is unconstitutional for the states to establish a privilege against state-of-mind discovery. The Constitution has never been construed as requiring the states to provide persons or organizations who have been defamed with a remedy for their injuries. It follows that to the extent a state chooses to authorize a cause of action for defamation, it may also limit the plaintiff's ability to prove his claim in order to promote other social purposes." *Id.* at 275 n. 74. (citations omitted).

None of the statements from *Herbert* quoted by petitioner (Pet. at 15, 17) contradict this point. On the contrary, petitioner would have this Court ignore its clear pronouncement in *Branzburg v. Hayes*, 408 U.S. 665 (1972):

> "It goes without saying, of course, that we are powerless to prevent our state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Id.* at 706; quoted in *Maressa, supra*, 89 N.J. at 189.

Petitioner has not attempted to assert that his interest in his reputation amounts to a constitutionally-protected liberty or property interest. Indeed, he cannot do so, in light of *Paul v. Davis*, 424 U.S. 693 (1976). *Herbert v. Lando* does recognize that reputation is a "basic concern", 441 U.S. at 169. But it is not a concern of constitutional dimensions, and hence does not authorize this Court to overrule the New Jersey Supreme Court's construction of its state-created Shield Law. *Paul v. Davis, supra*, 424 U.S. at 712. As one Federal court has stated:

> "Simply put, while an individual's interest in his reputation is a basic concern, *Herbert v. Lando, supra*,... Its reflection in the laws of defamation is solely a matter of State law." *Mazzella v. Philadelphia Newspapers*, 479 F. Supp. 523, 527 (E.D.N.Y. 1979), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

The *Mazzella* court, citing *Paul v. Davis, supra*, noted that since the defamation cause of action is state-created and enforced, the states can limit, modify or abolish it through the operation of testimonial privileges such as Shield Laws, absent any claim of constitutional deprivation. *Mazzella, supra*, 479 F. Supp. at 527. The foregoing language was cited by the New Jersey Supreme Court in holding that such limitations on the tort of defamation raise no constitutional issues and do not

constitute arbitrary or irrational state action. *Maressa, supra,* 89 N.J. at 190, 191* (Pet. App. at 12a-13a).

It is clear from the language of this Court's own opinions in *Branzburg v. Hayes, supra, Paul v. Davis, supra,* and *Herbert v. Lando, supra,* that while the First Amendment to the United States Constitution does not require either the Federal Government or State Governments to adopt an editorial process privilege or an absolute newsperson's privilege, there is no constitutional bar to a state adopting such a privilege as a matter of state statutory or constitutional law. State law controls the result in this case. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). Thus, there is no reason for this Court to review a case in which, essentially, it will only be rendering an advisory opinion. *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101-102 (1973).

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* In *Downing v. Monitor Publishing Company, Inc.*, 120 N.H. 383, 415 A.2d 683 (1980), cited by petitioner, the New Hampshire Court refused to adopt a "common law" newsperson's privilege. The decision is irrelevant to the within case for the reasons petitioner readily admits: that case arose in another jurisdiction, in which no statutory shield law was in effect. It is thus both factually and legally inapposite to the issues presented in the present petition.

II. The New Jersey Shield Law Does Not Violate Any Due Process Rights Of Libel Plaintiffs Nor Does It Abolish Defamation Claims By Public Officials Or Otherwise Violate The Equal Protection Clause.

At the outset, it must be noted that none of the arguments raised in petitioner's second Question were raised or preserved by petitioner in any of the state courts below. Petitioner's due process claim (Pet. at i, 16) was first raised before the New Jersey Supreme Court, which rejected it. *Maressa, supra,* 89 N.J. at 193 (Pet. App. at 14a-15a). Petitioner's "equal protection" argument (Pet. at 16) is being raised for the first time in his petition to this Court. He never raised or preserved this issue in any of the state courts, hence none of the Courts below considered it. Since the United States Supreme Court does not decide issues raised for the first time in a petition for certiorari, *Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969), petitioner's "equal protection" argument should be rejected on this ground alone.

Petitioner's "due process" argument is without merit since petitioner has not alleged the existence of any constitutionally-protected liberty or property interest, as is required for a federal question to exist. As has already been pointed out, *Paul v. Davis, supra* held that petitioner's interest in his reputation has no constitutional foundation and does not constitute "liberty" or "property" under the Fourteenth Amendment. The only interest asserted by petitioner is a matter of state tort law. That the states can therefore limit this interest as they see fit was recognized by this Court in *Branzburg v. Hayes, supra, Paul v. Davis, supra,* and *Martinez v. California,* 444 U.S. 277, 282 (1980). The decision of the New Jersey Supreme Court is wholly in accord with these precedents. *Maressa, supra,* 89 N.J. at 190-191 (Pet. App. at 12a-13a). As this aspect of petitioner's argument has already been discussed in Section I, *supra,* it need not be repeated here.

Petitioner also alleges, without any factual or legal support whatsoever, that the New Jersey Shield Law foreclosures public official and public figure plaintiffs from ever maintaining a

libel suit against a media defendant (Pet. at 15, 16). Petitioner asserts, again without any support, that the "discrimination" against public official and public figure plaintiffs somehow constitutes a denial of equal protection of the laws (Pet. at 16-17).

Petitioner greatly misstates the import of the New Jersey Supreme Court decision in this case. While the New Jersey Supreme Court decision, by necessity, discusses the Shield Law privilege with public official plaintiffs such as petitioner in mind, there is no limiting language in either the statute or the *Maressa* decision which confines its holding to public official and public figure plaintiffs only. Private figure plaintiffs would also be foreclosed from inquiring into a media defendant's confidential sources and editorial processes.*

Petitioner at no point sets forth the legal basis for his "equal protection" claim (Pet. at 16-17). He does not suggest, or attempt to demonstrate, that "public figure" libel plaintiffs are a suspect classification, or that the New Jersey Shield Law, as construed, violates some fundamental right implicitly or explicitly protected under the federal Constitution. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 17 (1973), *rehearing denied,* 411 U.S. 959 (1973); *Shapiro v. Thompson,* 394 U.S. 618, 630 (1969). The class of public official and public figure libel plaintiffs is not an "inherently suspect" distinction such as race, religion, or alienage, *Friedman v. Rogers,* 440 U.S. 1, 17 (1979), *rehearing denied,* 441 U.S. 917 (1979); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). And petitioner's interest in his reputation does not amount to a right of constitutional dimensions recognized by state or federal law, or rise to the level of

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* Private figure libel plaintiffs, moreover, have no more constitutional rights in their reputations than public figures. Though this Court did not reach the issue in its decision, it is clear that the plaintiff in *Paul v. Davis, supra* was a private figure. *Cf. Wolston v. Reader's Digest Ass'n., Inc.,* 443 U.S. 157 (1979).

fundamental rights such as marriage, procreation, contraception, family relationships, or education. *Paul v. Davis, supra,* 424 U.S. at 712-13. Hence this contention is without merit.*

Nor is petitioner (or any other public official/figure plaintiffs), foreclosed from proving actual malice in a defamation action against a media defendant as a result of the privileges conferred by the New Jersey Shield Law. As Justice Pashman was careful to point out in his majority opinion, a public figure may be able to establish actual malice by inferential evidence. In cases where a defamatory report was published, and reliance is claimed solely on confidential sources, trial courts must consider whether the circumstances of the publication warrants submission of the actual malice issue to the jury. In such cases, a sufficient inference of actual malice can arise where a false report is published solely in reliance on confidential sources and: (1) the content of the report is such as to be defamatory as a matter of law; (2) the defendant knew or should have known of some reasonable means to verify accuracy; and (3) the failure to verify rises to the level of the gross violation of the standards of responsible journalism. When such recklessness approaches the level of publishing a knowing falsehood, the issue should be submitted to the jury. Justice Pashman notes that in such cases, the defendant may decide to voluntarily reveal its sources in order to rebut an inferential showing of actual malice. *Maressa, supra,* 89 N.J. at 199-200 (Pet. App. at 20a-21a). Where the

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* This "equal protection" argument may be based on petitioner's assumption that a private figure plaintiff, not having to prove actual malice under the *New York Times* standard, might be able to prevail in a defamation action in New Jersey merely upon a showing that the media defendant acted negligently or with gross negligence. This assumption has no factual basis. The standard of conduct to be applied to a media defendant in a private figure defamation action has never been decided by the New Jersey Courts, pursuant to the dictates of *Gertz v. Robert Welch, Inc., supra.* To date, the New Jersey Courts have explicitly avoided any decision on this issue. One New Jersey Appellate Division opinion suggests that a stricter-than-negligence standard should apply in defamation actions brought by private figure plaintiffs, noting that this Court's opinion in *Gertz v. Robert Welch, Inc., supra,* does not compel the New Jersey courts to adopt a negligence standard. *Barbetta Agency, Inc. v. Evening News Publishing Company,* 135 N.J. Super 214, 221-23 (App. Div. 1975). The impact of the Shield Law on private figure plaintiffs is not before this Court in this action.

sources are not confidential — i.e. the sources are identified in the publication — there is, of course, no problem. Their disclosure compromises no confidential relationships of a media defendant. *Maressa,* 89 N.J. at 194-195 (Pet. App. at 15a-16a).

Accordingly, petitioner's asserted "due process" and "equal protection" arguments are far too speculative and hypothetical to rise to the level of a "substantial federal question" within the language of 28 U.S.C. Section 1257(3). At most, petitioner can only assert that he himself may be unable to prove actual malice without disclosure of respondent's confidential sources and editorial processes. That his case is weak as opposed to other potential libel plaintiffs is not the kind of "special and important reasons" required by this Court for *certiorari* jurisdiction to exist. *Sup. Ct. R.* 17.

At most, Petitioner's "due process" and "equal protection" claims are grounded on the infringement of a "constitutional right" which never existed. At no time did Petitioner ever have any state "constitutional right" to bring a defamation action under Article I, Paragraph 6 of the 1947 New Jersey Constitution* (Pet. at 14, 16); nor has such a right ever been afforded to any other New Jersey libel plaintiff, public or private. This claim was explicitly considered and rejected by the New Jersey Supreme Court in its majority opinion. *Maressa, supra,* 89 N.J. at 192-193** (Pet. App. at 13a-14a).

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* *N.J. Const.,* (1947), Art. I, Section VI (Pet. at 3).

** To the contrary, Justice Pashman recognized that the New Jersey Constitution grants the press wide freedom because of the belief that the public interest is served by an informed citizenry. *Maressa, supra,* 89 N.J. at 200 (Pet. App. at 22a). However, the Court did not find it necessary to determine whether the New Jersey Constitution, by itself, granted an absolute evidentiary privilege against forced disclosure of editorial processes, holding that the language of the statute was a sufficient basis for its holding that the privilege was absolute. *Id.* at 189. There is now no question that state constitutions can provide more rights to citizens than the United States Constitution. *Pruneyard Shopping Center v. Robbins,* 447 U.S. 74, 81 (1980). Of course, the issue of whether the New Jersey Constitution independently provides such a privilege is not properly before this Court.

This argument appears to be an attempt to persuade this Court to act as a "super-appeals court", with power to overrule the New Jersey Supreme Court even in the absence of the existence of any substantial federal question. It is not the function of this Court to construe a state statute or constitutional provision contrary to that construction given it by that state's highest court. * *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 837 n.9 (1978); *Eastlake v. Forrest City Enterprises,* 426 U.S. 668, 674 n.9 (1976); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256 (1974); *O'Brien v. Skinner,* 414 U.S. 524, 531 (1974). Nor is any federal question presented by a claim that the New Jersey Supreme Court exceeded its powers under, or misconstrued, the New Jersey Constitution. *Schuylkill Trust Company v. Pennsylvania,* 302 U.S. 506, 512 (1938).

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* A state constitutional provision is a "statute" for purposes of review under 28 U.S.C. Section 1257(3). *Pruneyard Shopping Center v. Robbins, supra,* 447 U.S. at 79.

III. The Judgment Which Petitioner Seeks To Have Reviewed In This Court is Not A Final Judgment Under 28 U.S.C. 1257(3).

This is an interlocutory appeal on a discovery issue, concerning the construction to be given to a state evidentiary privilege statute. The decision of the New Jersey Supreme Court contemplates further substantive proceedings in the lower courts, including the possibility of a full trial, which will neither preclude nor require a decision on the asserted federal issue presented in the petition. These further state proceedings could have a substantial effect on the federal constitutional issues raised in the petition for certiorari. *Minnick v. California Department of Corrections*, 452 U.S. 105, 120-23 (1981).

The party seeking review by writ of certiorari must demonstrate that this Court has jurisdiction to grant the writ and review the case. *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965). It is therefore the duty of petitioner to show that the judgment for which review is sought is a "final judgment" within the purview of 28 U.S.C. Section 1257(3). This he cannot do.

The United States Supreme Court takes jurisdiction only over cases in which final judgments have been rendered by the State Court of last resort. *New York Times Company v. Jascalevich*, 439 U.S. 1317 (1980); *United States v. MacDonald*, 435 U.S. 850, 853 (1978); *Southern Pacific Company v. Gileo*, 351 U.S. 493, 496 (1956). This prevents the Court from rendering advisory opinions on federal questions which may be unnecessary to the complete disposal of a case in the state courts. *Pope v. Atlantic C.L.R. Company*, 345 U.S. 379, 381-82 (1953). Accordingly, piecemeal review of cases is avoided and federal court intrusion into state affairs is kept to a minimum. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); *Radio Station W.O.W., Inc. v. Johnson*, 326 U.S. 120, 124 (1945). A decision is final when nothing of substance remains to be decided by the trial court. *Construction General Laborer's Union v. Curry*, 371 U.S. 542 (1963).

It is recognized that this rule is given a practical rather than a technical construction, and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), lists four categories of cases where a state court decision would be deemed "final" for purposes of United States Supreme Court review even though the state court decision would not meet the traditional definition of "finality". These categories are:

(a) cases which are over for all practical purposes because the federal issue controls the outcome or preordains it;

(b) cases in which the federal issue will eventually require a decision regardless of the outcome of further state proceedings;

(c) cases in which later review of the federal issue will be precluded regardless of the outcome of the state proceedings;

(d) cases in which the federal issue may be rendered moot if the appellant prevails on the merits in the state court, but Supreme Court review of that issue would preclude any further state proceedings, and a delay in Supreme Court review would seriously erode a federal policy. *Id.* at 479-83.

It can be readily demonstrated that the present petition fits within none of these four categories. As to the first, there is no dispute that *Herbert v. Lando, supra,* does not control the construction to be given to the New Jersey Shield Law. As to the second category, should respondents prevail in their pending summary judgment motion against petitioner, there would be no need to decide any of the alleged federal issues.* As to the remaining categories, no important federal issue has even been

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* Alternatively, if petitioner's cause of action survives, he may attempt to establish actual malice through the inferential process outlined in Justice Pashman's majority opinion in the New Jersey Supreme Court, discussed *supra*, regardless of the existence of the New Jersey Shield Law and the construction given it by the New Jersey Supreme Court.

presented, let alone one which would have to be decided regardless of the later state court proceedings to come, or which would preclude further state court proceedings.

Accordingly, since the decision of the New Jersey Supreme Court in this case cannot be deemed a "final judgment" within the purview of 28 U.S.C. Section 1257(3), the Petition for Certiorari should be denied on this ground alone.

IV. The Petition Filed in This Case Does Not Comply With Rule 21 of the Rules of the Supreme Court.

The Petition filed in this case violates *Supreme Court Rule* 21 in two respects. *First,* the petition fails to indicate, as required by *Sup. Ct. R.* 21.1(h), the stage in the proceedings in the state trial and appellate courts at which petitioner's asserted federal claims were raised and disposed of, with accompanying citations to the record below. *Second,* the statement of Questions Presented, the Statement of the Case, and the Argument do not clearly and accurately set forth the grounds upon which this Court's jurisdiction supposedly exists, or even the precise nature of the federal questions to be decided by this court, contrary to *Sup. Ct. R.* 21.5. For purposes of this Reply Brief, respondents have found it necessary to restate the *Questions Presented* to reflect their understanding of the issues actually addressed by the Petition. These defects alone constitute sufficient grounds for this Court to deny the requested writ. *Id.*

CONCLUSION

The decision of the New Jersey Supreme Court in this case presents no important questions of federal law which are unsettled by this court or which are in conflict with applicable decisions of this Court. The federal issues raised by petitioner are not yet ripe for review, and indeed, many of them were not presented or preserved in the state courts prior to the filing of this petition. Petitioner's claims concerning construction of the New Jersey Shield Law must be rejected, as this court has no power to overrule a state court's construction of its own laws. Nor does this case otherwise call for the supervision of the Supreme Court of the United States. For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

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SUPERIOR COURT
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LAW DIVISION
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DOCKET NO. L-18536-79

CIVIL ACTION
NOTICE OF MOTION

Plaintiff

JOSEPH A. MARESSA

vs.

Defendant

NEW JERSEY MONTHLY and HENDRIX, F.C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly severally, and in the alternative

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PLEASE TAKE NOTICE that on Friday, July 2, 1982, at 9:00 a.m. in the forenoon, or as soon thereafter as counsel may

be heard, the undersigned attorneys for the defendants New Jersey Monthly, Hendrix F.C. Niemann, Christopher Leach, Michael Aron, Teresa Carpenter, Harvey Fisher and Robert Narus, will make application to the Superior Court, Law Division, Camden County, at the Courthouse, Camden, New Jersey, for a Summary Judgment in favor of all of the defendants upon all claims made against the defendants by plaintiff in this action. Annexed hereto is a Brief and Appendix in support of this Motion.

BERNER, WALLACK & HILL
Attorneys for Defendants

BY: _____

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No. 82-197

In The

Supreme Court of the United States

October Term, 1981

JOSEPH A. MARESSA,

Petitioner,

vs.

NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,

Respondents.

On Writ of Certiorari to the New Jersey Supreme Court

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No. 82-197

In The

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JOSEPH A. MARESSA,

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NEW JERSEY MONTHLY and HENDRIX F.C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,

Respondents.

On Writ of Certiorari to the New Jersey Supreme Court

BRIEF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The New Jersey Press Association (hereinafter "NJPA") is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. The NJPA membership includes twenty-two (22) daily newspapers, ninety-nine (99) weekly newspapers, and one hundred forty-one (141) corporate and individual associates.

The case presented purports to draw into issue the constitutionality of the New Jersey Shield Law. N.J. Stat. Ann. §2A:84A-21. This law is of vital concern to the news media as it was promulgated to protect, within federal and state constitutional limits, the sources and information obtained by a reporter pursuing his professional activities. The NJPA is composed of the substantial majority of the weekly and daily official newspapers throughout the State. Hence, any determinations made concerning the constitutionality of the Shield Law will have a direct effect upon the NJPA and its constituents.

The NJPA has participated as an amicus in this matter before the New Jersey Supreme Court.

SUMMARY OF ARGUMENT

This Court has held that States have the sole right to fashion their own Shield Laws absent a countervailing federal right. There are no such countervailing rights in this instance. Therefore, a review of New Jersey's Shield Law is neither warranted nor appropriate.

ARGUMENT

I.

The New Jersey Legislature should not be interrupted in its process of suiting its Shield Law to the State's specific needs.

This Court permits state legislatures to effect laws according to their state interests, *Branzburg v. Hayes*, 408 U.S. 665 (1972). While holding that the First Amendment to the United States Constitution did not provide an evidentiary privilege for the press with respect to a Grand Jury investigation of criminal conduct, Justice White nevertheless went on to state:

> "*There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards* in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas." 408 U.S. at 706 (emphasis added).

Thus, this Court has recognized the importance of state legislative involvement in suiting a solution to press testimonial privileges.

The New Jersey State Legislature has assumed the responsibility of fashioning an appropriate press testimonial privilege. New Jersey's current Shield Law, N.J. Stat. Ann. §2A:84A-21 (West Supp. 1982-83), has evolved through a series of state legislative enactments. In particular, the Legislature reviewed and revised the law as late as 1979 in response to court interpretations. *In re Bridge*, 120 N.J. Super. 460, 295 A. 2d 3 (1972), *cert. den.* 410 U.S. 991 (1973); *In re Farber*, 78 N.J. 259, 394 A. 2d 330 (1978), *cert. den.* 439 U.S. 907 (1980). The resulting amendments refined the law to properly balance the needs of a free and robust press against the competing interest of an individual

in learning the source of that press' information within the dictated parameters of the New Jersey Supreme Court decisions as well as this Court's decisions.

In keeping with the court's pronounced desire to permit the States to develop their own Shield Law statutes, this Court should not interrupt the reasoned process of the New Jersey State Legislature to meet the needs of New Jersey.

II.

Where no federal rights are abridged the States are free to fashion their own Shield Laws consistent with their own Constitutions and interests.

This Court stated in *Branzburg v. Hayes,* 408 U.S. at 706:

> "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."

Citing this passage, Justice Pashman, writing for the New Jersey Supreme Court, affirmed the constitutionality of New Jersey's Shield Law, holding that where there are no countervailing federal or state constitutional rights, newspersons have an absolute evidentiary privilege. *Maressa v. New Jersey Monthly,* 89 N.J. 176, 189 (1982).

This case does not present an issue of infringement of any federal or state constitutional rights. This Court established in *Paul v. Davis,* 424 U.S. 693, 712 (1967) that there is no federal constitutional right to sue for damages to reputation alone.

Nor does this case present a federal question of denial of equal protection in conflict with the Fourteenth Amendment to the United States Constitution. In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court explained:

> "The Equal Protection clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle." 440 U.S. at 588.

Hence, even though evenhanded application may result in an uneven effect among certain groups, there is no violation. *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). "[T]he Fourteenth Amendment guarantees equal laws, not equal results." *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. at 273. The New Jersey Shield Law is an evidentiary privilege which applies equally to all persons similarly situated. All libel plaintiffs, *public and private*, are subject to the absolute testimonial privilege afforded under the statute. *Maressa v. New Jersey Monthly*, 89 N.J. at 194. Any unequal impact among libel plaintiffs is the result of differing proof burdens placed upon public versus private plaintiffs through the application of First Amendment principles rather than the New Jersey Shield Law.

Finally, the New Jersey Supreme Court has conclusively ruled that its Constitution does not create a right to maintain an action for libel. *Maressa v. New Jersey Monthly*, 89 N.J. at 192. Accordingly, there are no state constitutional rights abridged by this Shield Law.

Petitioner's argument that the Shield Law works difficulties upon him in his garnering of proof should not be confused with

the establishment of a constitutional deprivation. There simply is no basis in fact or law for such a proposition;[1] hence his petition should be denied.

CONCLUSION

New Jersey, through its Legislature and courts, has defined press testimonial privileges within the parameters granted it by the federal and its own Constitutions. It would be improvident for this Court to grant review on this petition for certiorari as no federal constitutional rights have been infringed upon.

Respectfully submitted,

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1. The Shield Law is a Rule of Evidence which does not bar suit, but rather precludes compelled disclosure from newspersons of the information within the ambit of the statute. Petitioner has speculated as to a prospective inability to prove his case because of this evidentiary privilege. However, as Justice Pashman noted below (89 N.J. 199-200) other avenues of discovery are available to petitioner.

At this juncture (pre-trial discovery), petitioner has not availed himself of these alternatives, and, as such, his petition would appear to be premature.